



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>















**REPORTS OF CASES**  
**DETERMINED IN**  
**THE DISTRICT COURTS OF APPEAL**  
**OF THE**  
**STATE OF CALIFORNIA**

---

**C. P. POMEROY**  
**REPORTER**  
**RANDOLPH V. WHITING**  
**ASSISTANT REPORTER**

---

**VOLUME 30**

**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**  
**1916**

**COPYRIGHT, 1916**  
**BY**  
**BANCROFT-WHITNEY COMPANY**

**SAN FRANCISCO**  
**THE FILMER BROTHERS ELECTROTYPE COMPANY**  
**TYPOGRAPHERS AND STEREOTYPERS**

# DISTRICT COURTS OF APPEAL.

---

## FIRST APPELLATE DISTRICT.

**THOS. J. LENNON**, Presiding Justice.

**FRANK H. KERRIGAN**, Associate Justice.

**JOHN E. RICHARDS**, Associate Justice.

## SECOND APPELLATE DISTRICT.

**N. P. CONREY**, Presiding Justice.

**W. P. JAMES**, Associate Justice.

**VICTOR E. SHAW**, Associate Justice.

## THIRD APPELLATE DISTRICT.

**N. P. CHIPMAN**, Presiding Justice.

**ELIJAH C. HART**, Associate Justice.

**ALBERT G. BURNETT**, Associate Justice.

(11)



## TABLE OF CASES—VOL. 30.

---

Akers v. Rappe.....	290
Alameda County, Havens v.....	206
Albers v. Superior Court of County of Humboldt.....	772
Alturas School District of Modoc County, Lynip v.....	794
American Casualty Company, Claxton v.....	457
American Surety Company of New York, San Dimas Quarry Com- pany v.....	8
Anderson v. Monticello Steamship Company.....	296
Anderson, People v.....	542
Annesley v. Victorino.....	420
Anthony, Thomas v.....	217
Application of June.....	767
Application of Long.....	442
Application of Preciado.....	323
Application of Wilson.....	567
Austin v. Strang.....	265
Bailey, People v.....	581
Banca Commerciale Italiana di Genova v. P. Schlegel and Company..	300
Barry v. Jackson.....	165
Bauer, Rosenthal v.....	277
Blood v. Industrial Accident Commission of State of California....	274
Blossom v. Waller.....	439
Board of Supervisors of City and County of San Francisco, Burr v..	755
Bradfield, People v.....	721
Bradford v. Sunset Land and Water Company.....	87
Broadmoor Improvement Company, Manning v.....	112
Browne v. Commercial Union Assurance Company.....	547
Brunswig Drug Company, Cooley v.....	58
Bruschi v. Cooper.....	682
Burr v. Board of Supervisors of City and County of San Francisco..	755
Butterworth, Hicks v.....	562
California Central Creameries Company v. Crescent City Light, Water & Power Company.....	619
Callander, United Motor San Francisco Company v.....	41
Casey, Hay v.....	570
Cavanaugh, People v.....	432
Champion, People v.....	463
Cherry, People v.....	285
Chin You, People v.....	18
Christie, Orchardson v.....	8
City of Modesto, Porterfield v.....	598



City of Oakland, Standard American Dredging Company v.....	237
City of Oakland, West v.....	554
Claxton v. American Casualty Company.....	457
Coelho v. Judson Manufacturing Company.....	39
Collis, People v.....	656
Colm v. Francis.....	742
Commercial Union Assurance Company, Browne v.....	547
Common Council of City of San Diego, Rigdon v.....	107
Consolidated Music Company v. Morrison.....	303
Cooley v. Brunswick Drug Company.....	58
Cooper, Bruschi v.....	682
County of Alameda, Havens v.....	206
County of Santa Cruz, Welch v.....	123
Crescent City Light, Water & Power Company, California Central Creameries Company v.....	619
Crosby v. Fresno Fruit Growers' Company.....	308
Crowley v. Savings Union Bank and Trust Company.....	144, 535
Cunningham, Gates v.....	319
Day, People v.....	762
Deatrick, People v.....	507
De Liere v. Goldberg, Bowen & Co.....	612
Dickinson, Union Trust Company of San Francisco v.....	91
District Council of Sheet Metal Workers, Wilson v.....	190
Dunne Investment Company, Olson-Mahoney Lumber Company v....	332
East San Mateo Land Company v. Southern Pacific Railroad Com- pany.....	223
East Side Canal and Irrigation Company v. Superior Court of County of Merced.....	528
Eberhard Tanning Company, McPherson v.....	289
Equitable Life Assurance Society, Flittner v.....	209
Evening Post Publishing Company, Riley v.....	294
Fairbanks, Morse & Company v. Zimmerman.....	81
Federal Construction Company v. Wold.....	360
Ferrar v. Western Assurance Company.....	489
Fisher, People v.....	135
Flittner v. Equitable Life Assurance Society.....	209
Fonts v. Southern Pacific Company.....	633
Fowler, People v.....	183
Fox v. Windemere Hotel Apartment Company.....	162
Francis, Colm v.....	742
Frank, Van Cott v.....	450
Frede v. Justices' Court of Los Angeles Township.....	85
Fresno Fruit Growers' Company, Crosby v.....	308
Fry, House v.....	157
Faller & Co., Poor v.....	650



Gambetta v. Gambetta.....	231
Gaskill v. Pacific Electric Railway Company.....	599
Gates v. Cunningham.....	319
General Accident, Fire and Life Assurance Corporation, Porter v....	193
Glassell, Hunt v.....	676
Goldberg, Bowen & Co., De Liere v.....	612
Goldwater, Innes v.....	101
Gordon v. Roberts.....	76
Grace & Company v. Levy.....	231
Gray, Roullard v.....	757
Grosse v. Petersen.....	432
Gunn, People ex rel. Smith v.....	114
Gwynn v. McKinley.....	231
Harpold v. Slocum.....	479
Hart, Lovejoy v.....	664
Hassey v. Buggles.....	19
Havens v. County of Alameda.....	206
Hay v. Casey.....	570
Hicks v. Butterworth.....	562
Holland, McCarthy v.....	495
Hooper v. Smith.....	460
House v. Fry.....	157
Hovia, People v.....	702
Huffman v. Knapp.....	759
Hunt v. Glassell.....	676
Industrial Accident Commission of State of California, Blood v....	274
Innes v. Goldwater.....	101
In re Johnson.....	792
In re Willis.....	186
Jacks, Swanton v.....	66
Jackson, Barry v.....	165
James J. Stevenson (Inc.), San Joaquin and Kings River Canal and Irrigation Company v.....	405
Jenkins v. Locke-Paddon Company.....	52
Joe Joy, People v.....	36
Johnson, In re.....	792
Johnson, King v.....	63
Joy, People v.....	36
Judson Manufacturing Company, Coelho v.....	39
June, Matter of Application of.....	767
Justices' Court of Los Angeles Township, Frede v.....	85
Kahrlein-Swinerton Construction Company v. Rapken.....	11
King v. Johnson.....	62

Knapp, Huffman v.....	759
Koch v. Wilcoxon.....	517
Lapique v. Ruef.....	391
Lauff, Moore v.....	452
Levy, W. B. Grace and Company v.....	231
Lewis, Pridham v.....	395
Linneweber v. Supreme Council Catholic Knights of America.....	316
Locke-Paddon Company, Jenkins v.....	52
Long, Matter of Application of.....	442
Los Angeles College of Osteopathy, Mortell v.....	422
Lovejoy v. Hart.....	664
Lynip v. Alturas School District of Modoc County.....	794
MacGillivray v. Owen.....	763
Manning v. Broadmoor Improvement Company.....	112
Marsh, People v. ....	424
Matson, People v.....	288
Matter of Application of June.....	767
Matter of Application of Long.....	442
Matter of Application of Preciado.....	323
Matter of Application of Wilson.....	567
Maupins, People v.....	392
McCarthy v. Holland.....	495
McCarty v. Superior Court of County of Los Angeles.....	1
McCowen, Sage Land and Improvement Company v.....	126
McInerney, People v.....	283
McKinley, Gwynn v.....	381
McLeod, People v.....	435
McPherson v. Eberhard Tanning Company.....	289
Meger, Rodemeyer v.....	514
Mettler v. Vance.....	499
Modesto, City of, Porterfield v.....	598
Moncur, Schneider v. ....	734
Montague, Rountree v.....	170
Monticello Steamship Company, Anderson v.....	296
Moore v. Lauff.....	452
Morrell v. San Tomas Drying and Packing Company.....	194
Morris v. Winans.....	575
Morrison, Consolidated Music Company v.....	303
Morrow v. Wells.....	306
Mortell v. Los Angeles College of Osteopathy.....	422
Mowry, Strauss v.....	308
Oakland, City of, Standard American Dredging Company v.....	237
Oakland, City of, West v. ....	556
Oakley, People v.....	419
Olson-Mahoney Lumber Company v. Dunne Investment Company...	332

Orchardson v. Christie.....	8
Otis, Robinson v.....	769
Owen, MacGillivray v.....	768
 Pacific Electric Railway Company, Gaskill v.....	 598
Pacific Portland Cement Company v. Reinecke.....	501
Palmer v. Woodruff.....	251
Parker, Williams v.....	71
Pasqueria, People v.....	625
People v. Anderson.....	542
People v. Bailey.....	581
People v. Bradfield.....	721
People v. Cavanaugh.....	482
People v. Champion.....	463
People v. Cherry.....	285
People v. Chin Yow.....	18
People v. Collis.....	656
People v. Day.....	762
People v. Deatriek.....	507
People v. Fisher.....	135
People v. Fowler.....	183
People ex rel. Smith v. Gunn.....	114
People v. Hovis.....	703
People v. Joe Joy.....	36
People v. Marsh.....	424
People v. Matson.....	238
People v. Maupins.....	392
People v. McInerney.....	283
People v. McLeod.....	435
People v. Oakley.....	419
People v. Pasqueria.....	625
People v. Phillips.....	31
People v. Ponchette.....	399
People v. Rizotto.....	616
People v. Terramorse.....	267
People v. Traux.....	471
People v. Vermillion.....	417
People v. Waugh.....	402
People v. Weir.....	766
People v. Wilkison.....	473
Petersen, Grosse v.....	432
Peterson v. Superior Court of County of Butte.....	466
Phillips, People v.....	31
Ponchette, People v.....	399
Poor v. W. P. Fuller & Co.....	650
Porter v. General Accident, Fire and Life Assurance Corporation....	198
Porter v. Superior Court of County of Los Angeles.....	608
Porterfield v. City of Modesto.....	598

Preciado, Matter of Application of.....	323
Prentice, Tischhauser v.....	699
Pridham v. Lewis.....	395
Priestley v. Stafford.....	523
P. Schlegel and Company, Banca Commerciale Italiana di Genova v..	300
Rapken, Kehrlein-Swinerton Construction Company v.....	11
Rappe, Akers v.....	290
Reinecke, Pacific Portland Cement Company v.....	501
Reis, Smith v.....	579
Rigdon v. Common Council of City of San Diego.....	107
Riley v. Evening Post Publishing Company.....	294
Risotto, People v.....	616
Roberts, Gordon v.....	76
Roberts v. Superior Court of County of Stanislaus.....	714
Robinson v. Otis.....	769
Roehe v. Superior Court of County of San Diego.....	255
Rodemeyer v. Meger.....	514
Rosenthal v. Bauer.....	277
Roullard v. Gray.....	757
Rountree v. Montague.....	170
Ruef, Lapique v.....	391
Ruggles, Hassey v.....	19
Sage Land and Improvement Company v. McCowen.....	126
St. Paul Fire and Marine Insurance Company v. Southern Pacific Company.....	140
San Dimas Quarry Company v. American Surety Company of New York.....	3
San Joaquin and Kings River Canal and Irrigation Company v. James J. Stevenson.....	405
Santa Cruz County, Welch v.....	123
San Tomas Drying and Packing Company, Morrell v.....	194
Savings Union Bank and Trust Company, Crowley v.....	144, 535
Schlegel and Company, Banca Commerciale Italiana di Genova v.	300
Schneider v. Moneur.....	734
Scott v. Superior Court of City and County of San Francisco....	793
Simmons v. Superior Court of County of San Diego.....	252
Slocum, Harpold v.....	479
Smith, Hooper v.....	460
Smith v. Reis.....	579
Soule v. Wyatt.....	778
Southern Pacific Company, Fonts v.....	633
Southern Pacific Company, St. Paul Fire and Marine Insurance Company v.....	140
Southern Pacific Railroad Company, East San Mateo Land Com- pany v. ....	223
Spreckels v. State of California.....	363

Stafford, Priestley v.....	523
Standard American Dredging Company v. City of Oakland.....	237
State of California, Spreckels v.....	363
Steinbroner v. Steinbroner.....	673
Stevinson, San Joaquin and Kings River Canal & Irrigation Com- pany v.....	405
Stone & Webster Construction Company, Tubbs v.....	705
Strang, Austin v.....	265
Strauss v. Mowry.....	305
Sunset Land and Water Company, Bradford v.....	87
Superior Court of County of Butte, Peterson v.....	466
Superior Court of County of Humboldt, Albers v.....	772
Superior Court of County of Los Angeles, McCarty v.....	1
Superior Court of County of Los Angeles, Porter v.....	608
Superior Court of County of Merced, East Side Canal and Irriga- tion Company v.....	528
Superior Court of County of San Diego, Roche v.....	255
Superior Court of County of San Diego County, Simmons v.....	252
Superior Court of County of San Diego, Weis v.....	730
Superior Court of City and County of San Francisco, Scott v.....	793
Superior Court of County of Stanislaus, Roberts v.....	714
Supreme Council Catholic Knights of America, Linneweber v.....	315
Swanton v. Jacks.....	66
 Terramorse, People v.....	267
Thomas v. Anthony.....	217
Tischhauser v. Prentice.....	699
Truax, People v.....	471
Tubbs v. Stone & Webster Construction Company.....	703
 Union Trust Company of San Francisco v. Dickinson.....	91
United Motor San Francisco Company v. Callander.....	41
 Vance, Mettler v.....	499
Van Cott v. Frank.....	450
Vermillion, People v.....	417
Victurino, Annesley v.....	420
 Waller, Blossom v.....	439
Waugh, People v.....	402
Weir, People v.....	766
Weis v. Superior Court of County of San Diego.....	730
Welch v. County of Santa Cruz.....	123
Wells, Morrow v.....	306
West v. City of Oakland.....	556
Western Assurance Company, Ferrar v.....	489
Whitecomb v. Worthing.....	629
Wileoxon, Koch v.....	517

---

Willison, People v. ....	473
Williams v. Parker.....	71
Willis, In re.....	188
Wilson, Application of.....	567
Wilson v. District Council of Sheet Metal Workers.....	190
Winans, Morris v.....	575
Windemere Hotel Apartment Company, Fox v.....	162
Weld, Federal Construction Company v.....	360
Woodruff, Palmer v.....	251
Worthing, Whitecomb v.....	629
W. P. Fuller & Co., Poor v.....	650
W. B. Grace and Company v. Levy.....	231
Wyatt, Soule v.....	778
 Zimmerman, Fairbanks, Morse & Company v.....	 61

## CASES APPROVED, DISAPPROVED, CRITICISED, AND DISTINGUISHED.

---

Blevins v. Mullally, 22 Cal. App. 519. Approved.....	565
French v. Powell, 135 Cal. 636. Distinguished.....	6
Gorham v. Helman, 90 Cal. 346. Approved.....	56
Hall v. Clark, 163 Cal. 392. Distinguished.....	712
Harrison v. Colgan, 143 Cal. 69. Approved.....	390
Henderson v. De Turk, 164 Cal. 296. Approved.....	698
Jackson v. Shawl, 29 Cal. 267. Approved.....	104
Johnson v. Superior Court, 23 Cal. App. 618. Distinguished.....	254
People v. Barbera, 29 Cal. App. 604. Approved.....	473
People's Lumber Co. v. Gillard, 136 Cal. 55. Disapproved.....	7
Robison v. Mitchel, 159 Cal. 581. Distinguished.....	341
Union Sheet Metal Works v. Dodge, 129 Cal. 390. Disapproved....	7

(xiii)



## TABLE OF CASES CITED—VOL. 30.

Abeel v. Clark, 84 Cal. 226.....	37
Adams v. Hopkins, 144 Cal. 19.....	504, 505
Adams v. Weisendanger, 27 Cal. App. 590.....	162
Aetna Ins. Co. v. Renno, 96 Miss. 172.....	492
Alabama So. Ry. v. Vail, 155 Ala. 382.....	643
Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567.....	15
Aldis v. Schleicher, 9 Cal. App. 372.....	56
Alexander v. Central Lumber & Mill Co., 104 Cal. 532.....	653
Alferitz v. Arrivillaga, 143 Cal. 646.....	540
Amador Medean G. M. Co. v. South Hill G. M. Co., 13 Sawy. 523, 36 Fed. 668.....	750
American Can Co. v. Agricultural Ins. Co., 12 Cal. App. 133.....	491
American Type etc. Co. v. Packer, 130 Cal. 459.....	500
American Well etc. Co. v. Superior Court, 19 Cal. App. 497.....	416
Antonian v. Southern Pac. Co., 9 Cal. App. 728.....	711
Aspen Consol. G. M. Co. v. Williams, 27 Land Dec. 16.....	750
Ayres v. Milroy, 53 Mo. 516.....	702
 Bailey v. Fox, 78 Cal. 389.....	44, 47
Baker v. Baker, 139 Cal. 626.....	622
Baker v. Thompson, 14 Cal. App. 175.....	56
Baker v. Williamson, 4 Pa. St. 456.....	69
Baldwin v. Bornheimer, 48 Cal. 433.....	438
Baldwin's Estate, Matter of, 162 Cal. 472.....	597
Bank of Lemoore v. Fulgham, 151 Cal. 234.....	692, 697
Bannerman v. Boyle, 160 Cal. 205.....	592
Barker & Stewart Lumber Co. v. Marathon Paper Mills Co., 146 Wis. 12.....	347, 350
Barnett v. Barnett, 104 Cal. 298.....	227, 229
Barney v. Dolph, 97 U. S. 652.....	750
Barnum Wire etc. Works v. Seley, 34 Tex. Civ. App. 47.....	236
Barrett-Hicks Co. v. Glas, 14 Cal. App. 239.....	343, 359
Bartlett v. Collins, 109 Wis. 477.....	213
Batcheller v. Whittier, 12 Cal. App. 262.....	155
Bates v. Gage, 49 Cal. 126.....	411, 413
Beason v. Shaw, 148 Ala. 544.....	259
Beaulieu Vineyard v. Superior Court, 6 Cal. App. 242.....	413
Bell v. Marsh, 80 Cal. 411.....	413, 414
Belser v. Allman, 134 Cal. 399.....	362
Benjamin v. District Grand Lodge, etc., 171 Cal. 260.....	318
Benton, In re, 234 Ill. 366.....	368
Berka v. Woodward, 125 Cal. 119.....	66
Bernheim etc. Co. v. Elmore, 12 Cal. App. 85.....	15
Berson v. Nunan, 63 Cal. 550.....	10
Bertelsen v. Bertelsen, 7 Cal. App. 258.....	152
Best v. Wohlford, 153 Cal. 20.....	694
Bette, Estate of, 171 Cal. 583.....	178
Bettencourt v. Sheehy, 157 Cal. 698.....	569
B. F. Avery & Sons v. Woodruff, 144 Ky. 227.....	349
Bird v. Utica etc. Co., 2 Cal. App. 672.....	441
Black v. Board of Police Commrs., 17 Cal. App. 310.....	585
Blair v. McCormack Construction Co., 123 App. Div. (N. Y.) 30....	614
Black v. Commonwealth Am. Corp., 19 Cal. App. 720.....	344, 359
Blevins v. Mullally, 22 Cal. App. 519.....	565, 566

Bliss v. Sneath, 119 Cal. 526.....	621
Board of Chosen Freeholders v. Buck, 79 N. J. Eq. 472.....	227
Bodine v. Arthur, 91 Ky. 53.....	229
Bone v. Hayes, 154 Cal. 759.....	69
Bonnet v. Foot, 47 Colo. 282.....	525
Booth v. Oakland Bank of Savings, 122 Cal. 19.....	151, 497
Born v. Castle, 22 Cal. App. 282.....	421, 759
Bostwick v. Mutual Life Ins. Co., 116 Wis. 392.....	555
Boutwell v. Globe & Rutgers Fire Ins. Co., 193 N. Y. 323.....	493
Bowers v. Union Pac. R. R. Co., 4 Utah, 215.....	62
Brandon v. Umpqua L. & T. Co., 166 Cal. 322.....	16
Breeze v. Brooks, 97 Cal. 72.....	61
Broder v. Conklin, 98 Cal. 360.....	413
Brown v. Hurst, 1 Cal. App. 752.....	520
Brown v. Kling, 101 Cal. 295.....	294
Bryant v. Isburgh, 74 Am. Dec. 658 (note).....	221
Buckley v. Superior Court, 102 Cal. 6.....	456
Budd v. Superior Court, 14 Cal. App. 256.....	2
Bump, Estate of, 152 Cal. 274.....	183
Burnett v. Piercy, 149 Cal. 178.....	227, 228
Burns v. Sennett, 99 Cal. 363.....	248
Bush v. Wood, 8 Cal. App. 647.....	646
Butler v. Soule, 124 Cal. 69.....	620, 624
Buzzell v. Laconia Man. Co., 48 Me. 113.....	646
Byrne v. Hudson, 127 Cal. 254.....	534
Byrnes v. Hatch, 77 Cal. 241.....	311, 312
Cahill, In re, 74 Cal. 52.....	263
Cahow v. Chicago Ry. Co., 113 Iowa, 224.....	644
California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692.....	357
California Sav. Bank v. American Surety Co., 87 Fed. 120.....	213
California Sav. & Loan Soc. v. Harris, 111 Cal. 133.....	15
Callan v. Bull, 113 Cal. 593.....	642
Campbell v. Crampton, 2 Fed. 417.....	215
Campodonico v. Oregon Imp. Co., 87 Cal. 566.....	311
Canadian etc. Co. v. Clarita etc. Co., 140 Cal. 672.....	620
Carpenter v. Bradford, 23 Cal. App. 560.....	15
Carr v. Carr, 15 Cal. App. 480.....	150
Carroll v. Safford, 3 How. (U. S.) 441.....	750
Carter v. McQuade, 83 Cal. 274.....	540
Casey v. Richards, 10 Cal. App. 57.....	56
Cashin v. Dunn, 58 Cal. 581.....	362
Catanish v. Hayes, 52 Cal. 338.....	461
Cave v. Crafts, 53 Cal. 135.....	516
Cederberg v. Robison, 100 Cal. 93.....	486
Cheever v. Wilson, 9 Wall. (U. S.) 123.....	674, 676
Cheevers, In re, 219 Mass. 244.....	276
Chicago etc. R. R. Co. v. Hines, 132 Ill. 161.....	652
Chicago etc. Ry. Co. v. Ross, 24 Ind. App. 222.....	143
Choctaw etc. R. R. Co. v. Jones, 77 Ark. 367.....	709
Choctaw etc. R. R. Co. v. Jones, 4 L. R. A. (N. S.) 858, note.....	712
Christy v. Board of Supervisors, 39 Cal. 3.....	120
City Carpet etc. Works v. Jones, 102 Cal. 506.....	294
City of Los Angeles v. Pomeroy, 124 Cal. 597.....	413
Clapton v. Taylor, 49 Mo. App. 117.....	561
Clark, In re, 125 Cal. 388.....	720
Clarke v. Cobb, 121 Cal. 595.....	567
Clarkson v. Morrison, 24 Mo. 134.....	759
Clary v. Fitzgerald, 155 App. Div. (N. Y.) 659.....	498

Claudius v. Aguirre, 89 Cal. 506.....	10
Cleveland Fire-Alarm Co. v. Metropolitan Fire Commrs., 55 Barb. (N. Y.) 288.....	561
Clute v. Loveland, 68 Cal. 254.....	24
Coalinga Pacific Oil etc. Co. v. Associated Oil Co., 16 Cal. App. 361..	567
Coburn, Matter of, 165 Cal. 202.....	37
Coghlan v. Quartararo, 15 Cal. App. 662.....	352
Cohen v. Anderson, 22 Cal. App. 634.....	690
Cohn v. Kelly, 132 Cal. 468.....	75
Colsh v. Chicago R. R. Co., 149 Iowa, 176.....	643
Commonwealth v. Allen, 128 Mass. 308.....	584
Commonwealth v. McGovern, 116 Ky. 212.....	733
Cook v. Suburban Realty Co., 20 Cal. App. 538.....	100
Cooney v. Glynn, 157 Cal. 583.....	152
Corning v. Loomis, 111 Mich. 23.....	208
Coss v. MacDonough, 111 Cal. 662.....	342
Cowell, Estate of, 164 Cal. 636.....	181
Cox v. McLaughlin, 76 Cal. 60.....	759
Crabbe v. Mammoth etc. Co., 168 Cal. 500.....	714
Craig v. San Bernardino Investment Co., 101 Cal. 124.....	765
Cream City Glass Co. v. Friedlander, 84 Wis. 53.....	50, 51
Credit Clearance Bureau v. Hochbann Contracting Co., 25 Cal. App. 546.....	221
Crim v. Kessing, 89 Cal. 478.....	413
Cromwell v. Stephens, 2 Daly (N. Y.), 15.....	164
Cromwell v. Wilkinson, 18 Ind. 365.....	500
Cross v. Eureka Lake etc. Canal Co., 73 Cal. 302.....	681
Cross v. Mayo, 167 Cal. 594.....	633
Crossman v. Vivlenda Water Co., 150 Cal. 575.....	15
Crowley v. Savings Union Bank etc. Co., 22 Cal. App. Dec. 597..	537, 541
Crowther v. Rowlandson, 27 Cal. 377.....	415
Cunningham v. Los Angeles Ry. Co., 115 Cal. 561.....	653
Curias v. Packard, 29 Cal. 194.....	504
Curtin v. Kowalsky, 145 Cal. 431.....	463
Cushing v. Building Association, 165 Cal. 781.....	681
Daley v. Buss, 86 Cal. 114.....	95
Dallman v. Frank, 1 Cal. App. 541.....	380
Darlington Lumber Co. v. Westlake Const. Co., 161 Mo. App. 723.....	347, 350
Davis v. Millaudon, 17 La. Ann. 97.....	590
Davis v. Pacific Telephone etc. Co., 127 Cal. 312.....	479
Davis v. Treacy, 8 Cal. App. 395.....	356
Dela, Ex parte, 25 Nev. 346.....	445
De Lavaca, Estate of, 165 Cal. 607.....	143
Denigan v. Hibernia Sav. & Loan Society, 127 Cal. 137.....	156
Dennison v. Chapman, 105 Cal. 447.....	655
Deputy v. Mooney, 97 Ind. 463.....	208
Dessert's Estate, In re, 154 Wis. 320.....	370
Deunineck v. West Gallatin Irr. Co., 28 Mont. 261.....	221
Donegan v. Houston, 5 Cal. App. 626.....	351
Drew v. Pedlar, 87 Cal. 443.....	573
Drinkhouse v. German Sav. & L. Soc., 17 Cal. App. 162....	150, 161, 497
Duff v. Duff, 71 Cal. 513.....	415
Duffy Lumber Co. v. Stanton, 9 Cal. App. 38.....	336
Dunham v. Dunham, 162 Ill. 589.....	675
Durbrow v. Chesley, 24 Cal. App. 418.....	765
Dwight v. Cutler, 3 Mich. 566.....	134
Dyas v. Southern Pacific Co., 140 Cal. 296.....	641

Easton v. Montgomery, 90 Cal. 307.....	134
Eaton v. Locey, 22 Cal. App. 769.....	155
Edwards v. Grand, 121 Cal. 254.....	430
Edwards v. United States, 103 U. S. 471.....	427, 428
Emerie v. Alvarado, 90 Cal. 444.....	695
Enos v. Sun Ins. Co., 67 Cal. 621.....	204
Equitable Life Ins. Co. v. Clements, 140 U. S. 226.....	213
Erreca v. Meyer, 142 Cal. 308.....	10
Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128...	692
Eureka City v. Wilson, 15 Utah, 53.....	771
Evans v. People, 12 Mich. 35.....	639
Ewing v. Goode, 76 Fed. 442.....	525
Faivre v. Daley, 93 Cal. 664.....	229
Fanning v. Green, 156 Cal. 279.....	152, 540
Farmer v. Behmer, 9 Cal. App. 773.....	733
Fidelity Mut. Life Ins. Co. v. Harris, 94 Tex. 25.....	213, 215
Field v. Lamson & Goodnow Mfg. Co., 162 Mass. 388.....	491
Firth, Estate of, 145 Cal. 236.....	178, 179
Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399.....	631
Fitch v. Windram, 184 Mass. 68.....	208
Plateau v. Lubeck, 24 Cal. 364.....	409
Forni v. Yoell, 99 Cal. 173.....	469
Foster v. Davis, 46 Mo. 268.....	69
Fountain Water Co. v. Dougherty, 134 Cal. 376.....	413
Franklin v. Merida, 50 Cal. 289.....	578
Franklin v. Southern Cal. Motor Road Co., 85 Cal. 63.....	62
Franklin Life Ins. Co. v. Galligan, 71 Ark. 295.....	215
Freese v. Hibernia etc. Society, 139 Cal. 392.....	323
French v. Powell, 135 Cal. 636.....	6
Fulkerson v. Stiles, 156 Cal. 703.....	152
Gallagher v. Equitable G. L. Co., 141 Cal. 699.....	575
Gamble v. Tripp, 99 Cal. 223.....	46
Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664.....	338
Gardner v. Stare, 125 Cal. 118.....	469
Gaynor, In re, 217 Mass. 86.....	276
Geneva v. Burnett, 65 Neb. 464.....	61
Georges v. Kessler, 131 Cal. 183.....	231
Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585.....	235
Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193.....	349
Gilmore, Ex parte, 71 Cal. 624.....	447
Glock v. Howard & Wilson Colony Co., 123 Cal. 1.....	573
Gold v. Sun Ins. Co., 73 Cal. 216.....	491
Gordon v. Roberts, 162 Cal. 506.....	79
Gorham v. Heiman, 90 Cal. 346.....	56
Gould v. Eaton, 111 Cal. 639.....	61
Gould v. Stein, 149 Mass. 570.....	236
Grannis v. Superior Court, 146 Cal. 245.....	622
Gray v. Bass, 42 Ga. 271.....	759
Great Western Power Co. v. Board of Supervisors, 21 Cal. App. 146.....	110, 112
Green v. Thornton, 130 Cal. 482.....	588
Grumbach v. Lelande, 154 Cal. 679.....	110, 111
Gruwell v. Seybolt, 82 Cal. 7.....	178
Grymes v. Sanders, 93 U. S. 55.....	47
Guerrero v. Ballerino, 48 Cal. 118.....	69
Gurnsey v. Northern California Power Co., 160 Cal. 699.....	231
Hale Bros. v. Milliken, 5 Cal. App. 344.....	6
Hall, Estate of, 154 Cal. 527.....	152

Hall v. Clark, 163 Cal. 392.....	709, 712, 714
Hall v. Lanning, 91 U. S. 160.....	675
Hammond v. Wallace, 85 Cal. 531.....	46
Hancock v. Board of Education, 140 Cal. 554.....	520
Hanley v. Hanley, 114 Cal. 693.....	181
Harbaugh v. Lassen Irrigation Co., 24 Cal. App. 778.....	452
Harkrader v. Goldstein, 31 Land Dec. 93.....	750
Harlan v. Stufflebeem, 87 Cal. 508.....	501
Harris, Estate of, 169 Cal. 725.....	151
Harrison v. Colgan, 148 Cal. 69.....	390, 398
Harron v. City of London Fire Ins. Co., 88 Cal. 16.....	491
Hastings v. Hastings, 31 Cal. 95.....	412, 417
Hatch, Ex parte, 15 Cal. App. 186.....	328
Hauck Clo. Co. v. Sharpe, 83 Mo. App. 385.....	215
Hawley v. Kocher, 123 Cal. 77.....	9
Hawley v. Los Angeles Creamery Co., 16 Cal. App. 50.....	401
Hayes v. Collins, 114 Mass. 54.....	755
Haynie v. Baylor, 18 Tex. 498.....	143
Heinlen v. Heilbron, 94 Cal. 636.....	531, 532
Henderson v. De Turk, 164 Cal. 296.....	695, 697, 698, 699
Henry v. Phillips, 163 Cal. 135.....	521
Hern v. Nichols, 1 Salk. 289.....	702
Hewel v. Hugin, 3 Cal. App. 248.....	314
Hibberd v. Smith, 50 Cal. 511.....	573
Hinds v. Gage, 56 Cal. 486.....	415
Hoffman, In re, 155 Cal. 114.....	110
Hoffman-Marks Co. v. Spires, 154 Cal. 111.....	336, 337
Holt Mfg. Co. v. Thornton, 136 Cal. 232.....	567
Hornef, Ex parte, 154 Cal. 355.....	546
Hough v. Grant's Pass Power Co., 41 Or. 531.....	653
Houghton v. Dickson, 29 Cal. App. 321.....	525
Howse v. Norwich etc. Fire Ins. Co., 10 Cal. App. 712.....	452
Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513.....	642
Hudgens v. Chamberlain, 161 Cal. 710.....	74
Huelsman, Estate of, 127 Cal. 275.....	173, 182
Hughes Mfg. etc. Co. v. Elliott, 167 Cal. 494.....	534
Humphreys v. McCall, 9 Cal. 59.....	314
Hunt v. Loucks, 38 Cal. 372.....	577
Huston v. Anderson, 145 Cal. 320.....	330
Illingsworth v. Rich, 58 N. J. L. 507.....	775
Indianapolis Southern R. Co. v. Wall, 54 Ind. App. 43.....	652
Insurance Co. of N. A. v. Osborn, 26 Ind. App. 88.....	143
Iverson v. Metropolitan Ins. Co., 151 Cal. 746.....	203
Jacks v. Baldez, 97 Cal. 91.....	620, 624
Jackson v. Shawl, 29 Cal. 267.....	104, 105
Jackson v. Torrence, 83 Cal. 521.....	208
James, In re, 99 Cal. 374.....	675
James v. Crockett, 34 N. B. 540.....	525
James v. Superior Court, 78 Cal. 107.....	411
Jamison v. San Jose & S. C. R. R. Co., 55 Cal. 593.....	62
Janson v. Brooks, 29 Cal. 214.....	504
Jergins v. Schenck, 162 Cal. 747.....	765
Jerome v. Stebbins, 14 Cal. 457.....	95
Johnson v. La Grave, 102 Cal. 324.....	350
Johnson v. Superior Court, 28 Cal. App. 618.....	254
Johnson v. Sweeney, 95 Cal. 306.....	765
Johnston v. Porter, 21 Cal. App. 97.....	56
Johnston v. Santa Clara County, 28 Cal. 547.....	95
Jones v. Iverson, 131 Cal. 101.....	653

Kaiser L. & F. Co. v. Curry, 155 Cal. 638.....	15
Kane v. Jones, 46 Wash. 631.....	428
Kearney v. Kearney, 72 Cal. 591.....	178
Keeney v. Leas, 14 Iowa, 464.....	437
Kebr v. City of Columbia, 136 Mo. App. 322.....	259
Keiser v. Levering, 29 Cal. App. 41.....	10
Kelly v. Murphy, 70 Cal. 560.....	9
Kennedy v. Commonwealth, 182 Mass. 480.....	347, 348
Kennedy v. McMurray, 169 Cal. 287.....	151
Kern Oil Co. v. Clark, 30 Land Dec. 550.....	751
Kiel v. Reay, 50 Cal. 61.....	415
Kimball v. Tripp, 136 Cal. 631.....	521
Kingsbury v. Nye, 9 Cal. App. 574.....	398
Kingsley, In re, 93 Cal. 576.....	590, 591
Kinsey v. Kellogg, 65 Cal. 111.....	121, 123
Klock v. Newbury, 63 Wash. 153.....	50
Knight v. Bucknill, 6 B. W. C. C. 160 (1913).....	276
Krakow v. Wille, 125 Wis. 284.....	208
Krasilnikoff v. Dundon, 8 Cal. App. 406.....	235
Kyle v. Craig, 125 Cal. 107.....	152
Laffey v. Kaufman, 134 Cal. 391.....	90
Lahiff, Estate of, 86 Cal. 151.....	178
Lambert v. McKenzie, 135 Cal. 100.....	680
Larew v. Newman, 81 Cal. 588.....	398
Leach v. Rowley, 138 Cal. 709.....	90
Le Breton v. Stanley Contracting Co., 15 Cal. App. 429.....	314
Lee v. Murphy, 119 Cal. 365.....	520
Leland v. Chehalis Lumber Co., 68 Wash. 632.....	653
Leslie v. Granite Ry. Co., 172 Mass. 468.....	643
Levinson v. Boas, 150 Cal. 185.....	104, 105
Lewis v. Lewis, 22 Cal. App. Dec. 607.....	263
Lewis v. Widder, 99 Cal. 412.....	361
Linforth v. White, 129 Cal. 188.....	532
Linwood Park Co. v. Van Dusen, 63 Ohio St. 183.....	165
Long Beach etc. Dist. v. Dodge, 135 Cal. 401.....	220
Los Angeles County v. Hammel, 26 Cal. App. 580.....	397
Lowe v. Superior Court, 165 Cal. 709.....	15
Lux, In re, 100 Cal. 593.....	181
Lux v. Haggin, 69 Cal. 255.....	587
Lynam v. Vorwerk, 13 Cal. App. 509.....	323
Lynip v. Alturas School District, 29 Cal. App. 158.....	794
MacClay Co. v. Meads, 14 Cal. App. 363.....	720
Madsen v. Maryland Casualty Co., 168 Cal. 204.....	204, 555
Magee v. North Pacific Coast R. R. Co., 78 Cal. 430.....	299
Mallory v. See, 129 Cal. 356.....	469, 533
Malone v. Crescent City M. & T. Co., 77 Cal. 38.....	97
Mann v. Mann, 141 Cal. 326.....	632
Marten v. Paul O. Burns Wine Co., 99 Cal. 355.....	46
Martin v. Thompson, 63 Cal. 3.....	312
Matthews v. Murchison, 17 Fed. 760.....	215
Max, Ex parte, 44 Cal. 579.....	450
Mayer v. Roche, 26 L. R. A. (N. S.) 767, note.....	215
McCowen v. Pew, 153 Cal. 735.....	231
McDonald v. Kansas City Bolt etc. Co., 149 Fed. 360.....	485
McEwen v. New York Life Ins. Co., 23 Cal. App. 694.....	205
McGowan v. Elder, 19 Idaho, 153.....	694
McGraw v. Kerr, 23 Colo. App. 163.....	526
McGregor v. Board of Trustees, 159 Cal. 441.....	260
McKendrick v. Western Zinc Min. Co., 165 Cal. 24.....	611

McLain v. Dahlstrom Metallic Door Co., 19 Cal. App. 475.....	648
McMullin, Matter of, 164 Cal. 504.....	465
McNamara v. MacDonough, 102 Cal. 575.....	655
McPhail v. People, 160 Ill. 77.....	584
McPhee, Estate of, 154 Cal. 385.....	87
Meads, Seaman & Co. v. Lasar, 92 Cal. 221.....	9
Medlin v. Spazier, 23 Cal. App. 242.....	655
Meiley v. St. Louis & S. F. Ry. Co., 215 Mo. 567.....	644
Mendocino County v. Peters, 2 Cal. App. 24.....	314
Messerly v. Mercer, 45 Mo. App. 327.....	165
Miles v. Baley, 170 Cal. 151.....	7
Miller v. Grunsky, 141 Cal. 441.....	244
Miller & Lux v. Kern County Land Co., 140 Cal. 132.....	442
Mills v. Sargent, 36 Cal. 382.....	180
Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578.....	416
Moody v. Southern Pac. Co., 167 Cal. 786.....	423
Moore, In re, 96 Cal. 522.....	178
Moore v. Gould, 151 Cal. 723.....	505
Morcon v. Baieraky, 16 Cal. App. 480.....	633
Morrell v. Morgan, 65 Cal. 575.....	504
Morrell v. San Tomas Drying etc. Co., 13 Cal. App. 305.....	194
Mulcahy v. Buckley, 100 Cal. 484.....	314
Mulcahy v. Glazier, 51 Cal. 626.....	621
Mulholland v. Western Gas Construction Co., 21 Cal. App. 44....	642
Murphy v. Clayton, 113 Cal. 153.....	522
Murphy v. Sumner, 74 Cal. 316.....	14
Nearing v. Coop, 6 N. D. 345.....	208
Nelson v. Merced County, 122 Cal. 644.....	125
Nelson v. Webb, 54 Ala. 436.....	759
Newell v. Brill, 2 Cal. App. 61.....	342
Newhall v. Western Zinc Min. Co., 164 Cal. 380.....	15, 16
Newman's Estate, In re, 75 Cal. 213.....	533, 621
New York Electric Co. v. Blair, 79 Fed. 896.....	644, 645
Noble v. Olympia Brewing Co., 64 Wash. 461.....	50
Nolan, Estate of, 145 Cal. 559.....	179
Norfolk & W. B. Co. v. Briggs, 103 Va. 105.....	143
North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 380....	236
Northwestern Mut. Life Ins. Co. v. McCue, 223 U. S. 234.....	213
O'Brien v. Look, 171 Mass. 36.....	643
O'Donnell v. Merguire, 131 Cal. 527.....	577
Oleese v. Justice's Court, 156 Cal. 82.....	719, 720, 775
Olson v. Minnesota etc. Ry. Co., 89 Minn. 280.....	208
Olson-Mahoney Lumber Co. v. Maxwell, 18 Cal. App. 668.....	336
Oppenheimer v. Clunie, 142 Cal. 313.....	49
O'Shea, In re, 11 Cal. App. 568.....	547
Pacific Factor Co. v. Adler, 90 Cal. 110.....	320
Pacific Mut. Life Ins. Co. v. Shepardson, 76 Cal. 376.....	532
Pacific Sash and Door Co. v. Bumiller, 162 Cal. 664.....	346
Packard v. Moss, 68 Cal. 123.....	690
Palmquist v. Mine & Smelter Co., 25 Utah, 257.....	643
Parkinson v. State, 14 Md. 184.....	38
Pascoe v. Baker, 158 Cal. 232.....	441
Patent Brick Co. v. Moore, 75 Cal. 205.....	220
Pavkovich v. Southern Pac. Co., 150 Cal. 39.....	228, 229
Payne v. Oakland Traction Co., 15 Cal. App. 127.....	646
Peabody v. Phelps, 9 Cal. 213.....	410
Peachy v. Witter, 131 Cal. 316.....	75

Pearsall v. Henry, 153 Cal. 314.....	221
Pellissier v. Corker, 103 Cal. 516.....	229
Penniman v. Hudson, 14 Barb. (N. Y.) 579.....	96
People v. Ah Sam, 41 Cal. 645.....	468
People v. Ah Toon, 68 Cal. 362.....	479
People v. Ah Woo, 28 Cal. 205.....	618
People v. Ammerman, 118 Cal. 23.....	477
People v. Barbera, 29 Cal. App. 604.....	473
People v. Board of Police, 26 Barb. (N. Y.) 481.....	427
People v. Burkhalter, 247 Ill. 600.....	370
People v. Chadwick, 143 Cal. 116.....	395
People v. Coffey, 161 Cal. 433.....	472
People v. Cornell, 28 Cal. App. 654.....	328
People v. Cummings, 123 Cal. 269.....	477
People v. Davis, 143 Cal. 673.....	624
People v. Dice, 120 Cal. 189.....	478
People v. Dole, 122 Cal. 486.....	139
People v. Doris, 14 App. Div. (N. Y.) 117.....	733
People v. Emerson, 130 Cal. 562.....	626
People v. Fitta, 4 Cal. App. 432.....	405
People v. Fitzpatrick, 80 Cal. 538.....	394
People v. Haagen, 189 Cal. 115.....	544
People v. Hartman, 23 Cal. App. 72.....	465
People v. Heacock, 10 Cal. App. 456.....	273
People v. Hill, 16 Cal. 113.....	409, 411
People v. Howard, 80 Cal. 538.....	394
People v. Hower, 151 Cal. 638.....	655
People v. Hurley, 8 Cal. 390.....	393
People v. January, 70 Cal. 34.....	328
People v. Jones, 160 Cal. 358.....	505
People v. Jordan, 172 Cal. 391.....	418, 420
People v. Kelley, 218 Ill. 509.....	368
People v. Kelsey, 34 Cal. 470.....	119, 120, 121
People v. King, 23 Cal. App. 259.....	767
People v. Leavens, 12 Cal. App. 178.....	704
People v. Maupins, 30 Cal. App. 392.....	419
People v. Meyers, 5 Cal. App. 674.....	188
People v. Milner, 122 Cal. 171.....	504
People v. Mohr, 157 Cal. 732.....	766
People v. Myring, 144 Cal. 351.....	479
People v. Nye, 9 Cal. App. 148.....	431
People v. Oiler, 66 Cal. 102.....	627
People v. Oppenheimer, 156 Cal. 733.....	547
People v. Osaki, 25 Cal. App. 330.....	628
People v. Palermo Land etc. Co., 4 Cal. App. 717.....	544
People v. Pang Sui Lin, 15 Cal. App. 262.....	272
People v. Perdue, 48 Cal. 552.....	328
People v. Perry, 65 Cal. 568.....	402
People v. Phillips, 70 Cal. 61.....	618
People v. Phillips, 27 Cal. App. 409.....	34
People v. Piyler, 121 Cal. 160.....	655
People v. Porter, 6 Cal. 26.....	427, 428
People v. Ramirez, 56 Cal. 533.....	394
People v. Ratledge, 172 Cal. 401.....	418, 420
People v. Russell, 19 Cal. App. 750.....	655
People v. Schlott, 162 Cal. 347.....	465
People v. Soto, 59 Cal. 368.....	655
People v. Sprague, 53 Cal. 491.....	655
People v. Strong, 30 Cal. 151.....	393
People v. Taylor, 36 Cal. 255.....	479

People v. Temple, 103 Cal. 447.....	620, 624
People v. Tom Nop, 124 Cal. 150.....	544
People v. Truckee Lumber Co., 116 Cal. 397.....	732
People v. Vermillion, 30 Cal. App. 417.....	420
People v. Ward, 107 Cal. 236.....	118, 119, 431
People v. Webster, 13 Cal. App. 348.....	729
People v. Wells, 2 Cal. 198.....	120
People v. Wells, 100 Cal. 459.....	272
People v. Williams, 17 Cal. 142.....	393
People v. Williams, 32 Cal. 280.....	393
People v. Wing, 147 Cal. 379.....	733
People's Lumber Co. v. Gillard, 136 Cal. 55.....	7
Perry v. J. Noonan Furniture Co., 8 Cal. App. 35.....	621
Perry Tie & Lumber Co. v. Reynolds, 100 Va. 264.....	485
Phoenix Ins. Co. v. Hancock, 123 Cal. 222.....	494
Phoenix Ins. Co. v. State, 76 Ark. 180.....	492
Phoenix Mut. Life Ins. Co. v. Simons, 52 Mo. App. 357.....	215
Pico v. Cohn, 91 Cal. 129.....	181
Pierce v. United Gas & Electric Co., 161 Cal. 176.....	613, 614
Pigeon v. W. P. Fuller & Co., 156 Cal. 691.....	653
Plympton v. Dunn, 148 Mass. 523.....	555
Pool v. Butler, 141 Cal. 46.....	231
Prendible v. Connecticut River Mfg. Co., 160 Mass. 131.....	642
Prentice v. Miller, 82 Cal. 570.....	504
Pritchard v. Whitney Estate Co., 164 Cal. 564.....	37
Pryce v. Jordan, 69 Cal. 569.....	462
Pullman Car Co. v. Lowe, 23 Neb. 239.....	165
Quinlan v. Noble, 75 Cal. 250.....	516
Quinn v. Electric Laundry Co., 155 Cal. 500.....	61
Ragsdale v. Nagle, 106 Cal. 332.....	294
Rauer v. Justice's Court, 115 Cal. 84.....	108
Reardon v. Balakiala C. O. Co., 193 Fed. 189.....	17
Reaves v. Territory, 13 Okl. 396.....	733
Reavis v. Cowell, 56 Cal. 588.....	437
Reay v. Butler, 95 Cal. 206.....	379
Reclamation Dist. v. Hamilton, 112 Cal. 610.....	765
Reclamation District No. 556 v. Thisby, 131 Cal. 573.....	412
Redington v. Cornwell, 90 Cal. 49.....	680, 759
Reed & Co. v. Harshall, 12 Cal. App. 697.....	15
Reeves v. Hannan, 65 N. J. L. 249.....	567
Reg. v. St. George's Union, L. R. 7 Q. B. 90.....	165
Reiter v. State, 51 Ohio St. 74.....	427
Reynolds, Estate of, 169 Cal. 600.....	368, 370
Reynolds v. County Court, 47 Cal. 604.....	108
Rice v. Board of Trustees, 107 Cal. 398.....	562
Rigby v. Superior Court, 162 Cal. 338.....	254
Riley v. Martinelli, 97 Cal. 575.....	522
Rinklin v. Acker, 125 App. Div. (N. Y.) 244.....	614
Robbins, Matter of, 27 Cal. App. 677.....	447
Roberts v. Roberts, 168 Cal. 307.....	69
Robinson v. Missisquoi R. R. Co., 59 Vt. 426.....	227
Robison v. Mitchell, 159 Cal. 581.....	340, 341, 350, 351
Rochdale etc. Co. v. King, 2 Sim., N. S., 89.....	586
Roche v. Llewellyn, 140 Cal. 563.....	613
Rock Ridge Park Co. v. Wells, 27 Cal. App. 281.....	463
Rosborough v. Boardman, 67 Cal. 116.....	118
Rosenthal v. People, 211 Ill. 309.....	370
Ross, Ex parte, 82 Cal. 109.....	395

Rowe v. Hibernia Sav. & Loan Society, 134 Cal. 406.....	155
Ruis v. Dow, 113 Cal. 490.....	151, 152
Rulofson v. Billings, 140 Cal. 452.....	155
Runo v. Williams, 162 Cal. 444.....	152
Russell v. Place, 94 U. S. 606.....	539
Salt Lake Investment Co. v. Fox, 32 Utah, 301.....	690
Sample v. Lyons, 59 App. Div. (N. Y.) 456.....	208
Sampson v. Hughes, 147 Cal. 62.....	143
Saunders v. Yoakum, 12 Cal. App. 543.....	56, 57
Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 183 N. Y. 306..	349
Schauer v. Queen Ins. Co., 88 Wis. 561.....	492
Scheerer & Co. v. Deming, 154 Cal. 138.....	333
Schieffelin v. Whipple, 10 Wis. 72.....	759
Schierhold v. North Beach & M. R. R. Co., 40 Cal. 447.....	62
Schilling v. Buhne, 139 Cal. 611.....	442
Shively v. Semi-Tropic etc. Co., 99 Cal. 259.....	351
School Dist. etc. v. Boyer, 46 Kan. 54.....	759
Schuricht v. Broadwell, 4 Mo. App. 160.....	209
Scott v. Glenn, 98 Cal. 170.....	89
Scott v. Umbarger, 41 Cal. 410.....	522
Security Loan & Tr. Co. v. Boston etc. R. F. Co., 126 Cal. 418....	720
Seiders v. Merchants' Life Assn., 93 Tex. 194.....	214
Shafer v. Sloan, 3 Cal. App. 337.....	294
Shannon v. Cheney, 156 Cal. 567.....	25
Sharman v. Continental Ins. Co., 167 Cal. 117.....	204, 554
Sharon v. Sharon, 75 Cal. 1.....	568
Shaw v. Bernal, 163 Cal. 262.....	540
Shaw v. Hollister etc. Co., 166 Cal. 257.....	90
Shearer v. Park Nursery Co., 103 Cal. 415.....	235
Shearman v. Jorgensen, 106 Cal. 483.....	533
Short v. Trabue, 61 Ky. (4 Met.) 298.....	214
Sichler v. Look, 93 Cal. 600.....	533
Siddall v. Clark, 89 Cal. 321.....	575
Silveira v. Iverson, 125 Cal. 266.....	61
Silveira v. Iversen, 128 Cal. 187.....	299, 642
Simmons v. Wagner, 101 U. S. 260.....	751
Skinner v. Fisher, 40 Land Dec. 112.....	751
Smaltz v. Boyce, 109 Mich. 382.....	143
Smith v. Buttner, 90 Cal. 95.....	653
Smith v. Dow, 43 Wash. 407.....	643
Smith v. Furlong, 160 Cal. 522.....	693
Smith v. St. Michael, 3 El. & El. 383.....	165
Snyder v. Holt Mfg. Co., 134 Cal. 324.....	641
Soberanes v. Soberanes, 97 Cal. 140.....	790
Southern Express Co. v. Gibbs, 155 Ala. 303.....	214
Southern Pac. R. R. Co., In re, 32 Land Dec. 51.....	751
Southern Pac. R. R. Co. v. United States, 168 U. S. 1.....	588
Spencer v. Branham, 109 Cal. 336.....	468
Sprague v. Walton, 145 Cal. 228.....	151, 152, 497
Sprott v. Reid, 3 G. Greene (Iowa), 489.....	578
Stamper v. Sunderland-near-the-Sea, L. R. 3 C. P. 388.....	165
Stark v. Starr, 6 Wall. (U. S.) 402.....	750
State (ex rel. Attorney General) v. Canty, 207 Mo. 439.....	732
State v. Crawford, 28 Kan. 518.....	733
State v. Kotecki, 155 Wis. 66.....	429
State v. Murphy, 30 Nev. 409.....	427, 429
State v. Ohio Oil Co., 150 Ind. 21.....	733
State v. Pabst, 139 Wis. 561.....	370
State v. Pawtuxet Turnpike Co., 8 B. I. 521.....	585

State v. Port of Tillamook, 62 Or. 332.....	585
State v. Potter, 63 Mo. 212.....	702
State v. Vanderbilt, 33 N. J. L. 38.....	693
State v. Water Commissioners, 30 N. J. L. 247.....	775
Steen v. Santa Clara Valley M. & L. Co., 4 Cal. App. 448.....	452
Stern v. City Council, 25 Cal. App. 685.....	591
Stevens v. Kobayshi, 20 Cal. App. 153.....	618
Stevenson v. Sun Ins. Office, 17 Cal. App. 280.....	492
Stewart v. Taylor, 68 Cal. 5.....	10
Stichtd v. State, 25 Tex. App. 420.....	618
Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30.....	345
Stockton Combined Harvester etc. Works v. Houser, 103 Cal. 377.....	442
Storke v. Goux, 129 Cal. 526.....	398
Stumpf v. Board of Supervisors, 131 Cal. 364.....	108
Sullivan v. Washburn & Moen Mfg. Co., 139 Cal. 257.....	416
Sulzberger v. Sulzberger, 50 Cal. 385.....	179
Summerville v. Stockton Milling Co., 142 Cal. 529.....	304
Swanger v. Mayberry, 59 Cal. 91.....	65
Swinnerton v. Monterey County, 76 Cal. 113.....	120
Tait v. Midway etc. Oil Co., 28 Cal. App. 107.....	441
Teller v. Schulz, 123 App. Div. (N. Y.) 883.....	208
Thompson v. Brannan, 76 Cal. 618.....	532
Thompson v. Whitman, 18 Wall. (U. S.) 457.....	675
Thorne, Matter of, 162 N. Y. 238.....	368
Tobelman v. Hildebrandt, 72 Cal. 315.....	179
Todd v. German-American Ins. Co., 2 Ga. App. 789.....	492, 493
Tomlinson v. Ayres, 117 Cal. 568.....	621
Toms v. Luckett, 5 C. B. 23.....	165
Townsend v. Parker, 21 Cal. App. 317.....	108
Townsend v. Tufts, 95 Cal. 257.....	89
Treat v. Treat, 170 Cal. 329.....	69
Tregambo v. Comanche M. & M. Co., 57 Cal. 501.....	430
Turner, Ex parte, 112 Cal. 629.....	323
Union Lumber Co. v. J. W. Schouten & Co., 25 Cal. App. 80....	421, 680
Union Lumber Co. v. Simon, 150 Cal. 751.....	352
Union Nat. Bank v. Chapman, 169 N. Y. 538.....	215
Union Sheet Metal Works v. Dodge, 129 Cal. 390.....	7
Union Trust Co. v. Ensign-Baker Refining Co., 22 Cal. App. Dec. 335.....	98
Union Trust Co. v. Knabe, 122 Md. 584.....	215
United States v. Behan, 110 U. S. 338.....	486
United States v. Justices of Lauderdale County, 10 Fed. 460....	429
Vallejo etc. E. Co. v. Reed Orchard Co., 169 Cal. 545.....	357, 416
Vance, Estate of, 100 Cal. 425.....	178
Van Cleave v. Bucher, 79 Cal. 600.....	578
Vancleaf v. Therasson, 20 Mass. (8 Pick.) 12.....	759
Vanderhurst v. Tholcke, 113 Cal. 147.....	771
Vaughn v. Bugg, 52 Vt. 235.....	759
Vibbard v. Roderick, 51 Barb. (N. Y.) 616.....	759
Volquards v. Myers, 23 Cal. App. 500.....	541
Warren v. Hopkins, 110 Cal. 506.....	61
Waverly Nat. Bank v. Hall, 150 Pa. St. 466.....	215
Welch, Estate of, 106 Cal. 427.....	181
Welch v. Strother, 74 Cal. 413.....	362
Wells v. Brown, 160 Cal. 515.....	227

---

Western Assurance Co. v. McAlpin, 23 Ind. App. 220.....	491
Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734....	204, 205
Whitney, Estate of, 171 Cal. 750.....	182
Williams, Ex parte, 89 Cal. 421.....	448
Williams v. Hawley, 144 Cal. 97.....	504
Williams v. Kidd, 170 Cal. 631.....	152, 153
Williams v. Lake, 2 El. & El. 349.....	96
Williams v. State, 45 Ind. 157.....	236
Willis v. Wozencraft, 22 Cal. 608.....	208
Wilson v. Eureka City, 173 U. S. 32.....	771
Wilson v. Martin, 1 Denio (N. Y.), 602.....	165
Wilson v. Prouty, 70 Cal. 197.....	312
Wirth v. Branson, 98 U. S. 118.....	751
Witherspoon v. Duncan, 4 Wall. (U. S.) 410.....	750
Wolfe v. Mosler Safe Co., 139 App. Div. (N. Y.) 848.....	643
Wolters v. Rossi, 126 Cal. 644.....	352
Wood v. Krepps, 168 Cal. 382.....	105
Wurdemann v. Barnes, 92 Wis. 206.....	525
 Zarnik v. Reiss Coal Co., 133 Wis. 290.....	 643

## CITATIONS—VOL. 30.

### CALIFORNIA.

#### CONSTITUTION.

Art. I, sec. 6.....	547
Art. I, sec. 15.....	465
Art. VI, sec. 1.....	383
Art. VI, sec. 4½.....	357, 542, 649
Art. VI, sec. 5.....	258, 383
Art. VI, sec. 11.....	383, 385
Art. VI, sec. 15.....	383, 387
Art. XI, sec. 5.....	117
Art. XI, sec. 8.....	591
Art. XI, sec. 8½, subd. 3.....	591
Art. XI, sec. 9.....	384, 385, 386, 387, 388, 398
Art. XI, sec. 11.....	770
Art. XI, sec. 18.....	361
Art. XIII, sec. 1½.....	206
Art. XX, sec. 4.....	117
Art. XX, sec. 16.....	591

#### STATUTES.

1860, pp. 311, 312. Probate Homestead.....	177
1861, p. 184. Pawnbrokers.....	104
1873-74 (Code Amd.) p. 315. New Trial.....	408
1877-78, p. 176. Trespassing of Animals.....	564, 565
1877-78, p. 378. Trespassing of Animals.....	564, 565
1897, p. 201. Public Work.....	5
1897, p. 254. Irrigation.....	683, 691
1897, p. 625. Public Officers.....	591
1899, p. 23. Street Improvement.....	6
1905, p. 341. Inheritance Tax.....	366
1907, p. 290. Sale of Real Property.....	64
1907, p. 498. Justices of Peace.....	382
1907, p. 717. New Trial.....	408
1907, p. 999. Trespassing of Animals.....	564, 565
1907, p. 1059. Municipal Corporation.....	770
1909, p. 213. Juvenile Court.....	189
1909, p. 382. Justices of Peace.....	382
1909, p. 969. Pawnbrokers.....	106
1911, p. 207. Justices of Peace.....	382
1911, p. 599. Local Option.....	257, 445
1911, p. 602. Local Option.....	37
1911, p. 655. Justices of Peace.....	382

## STATUTES—Continued.

1911, p. 730.	Street Improvements.....	361, 362
1911, p. 796.	Employers' Liability.....	607, 713
1911, p. 1003.	Banking.....	498
1911, p. 1313.	Mechanics' Liens.....	336
1911, p. 2161.	Public Officers.....	333
1913, p. 284.	Workmen's Compensation.....	275
1913, p. 1226.	Justices of Peace.....	385
1913, p. 1442.	Justices of Peace Fees.....	266
1913, p. 1486.	Los Angeles Charter.....	396
1915, p. 323.	County Government.....	333
1915, p. 325.	County Government.....	333
1915, p. 413.	Motor Vehicles.....	776
1915, p. 606.	Fish Protection.....	544, 545
1915, p. 1225.	Juvenile Court.....	189
1915, pp. 1379, 1380.	Justices of Peace.....	386
1915, p. 1441.	Improvement Bonds.....	361, 362, 468
1915, pp. 1655, 1656.	County Government.....	334

## CODE OF CIVIL PROCEDURE.

SECTION	PAGE	SECTION	PAGE
187 .....	259, 260, 261	656 .....	414
318 .....	685, 687	659 .....	408, 412, 414, 416, 533
319 .....	685, 687	667 .....	9
323 .....	685, 687, 690	670 .....	621, 624
337 .....	680	694 .....	579
339 .....	572	731 .....	731, 733
352 .....	423	805 .....	586
370 .....	423	832 .....	718, 719
372 .....	263	848 .....	718, 719
378 .....	455	859 .....	467, 468, 470
382 .....	455	893 .....	468, 469
409 .....	522	950 .....	264
411 .....	260	975 .....	468
412 .....	610, 611	978a .....	2
430 .....	455	981 .....	253, 254
431 .....	455	1010 .....	469
437 .....	100	1011 .....	532
449 .....	481	1012 .....	532
473 .....	451, 452	1015 .....	532
475 .....	357, 542	1069 .....	108
476 .....	461	1075 .....	86, 87
577 .....	588	1077 .....	108, 109
632 .....	416	1111 .....	258
634 .....	620, 622	1119 .....	259
649 .....	531	1183 .....	345
650 .....	452	1187 .....	330, 341, 342, 357, 359

## CODE OF CIVIL PROCEDURE—Continued.

SECTION	PAGE	SECTION	PAGE
1200 .....	336, 337, 354, 356	1881 .....	638
1668 .....	572	1911 .....	589
1675 .....	454, 455	1943 .....	487
1676 .....	456	1963 .....	504, 689
1835 .....	758	2061 .....	655
1875 .....	752		

## CIVIL CODE.

SECTION	PAGE	SECTION	PAGE
4 .....	429	1638 .....	227, 232
34 .....	216	1641 .....	229, 230
41 .....	162	1642 .....	280
138 .....	262, 464, 465	1650 .....	282
139 .....	262, 465	1652 .....	281, 282
140 .....	262	1654 .....	244, 251, 281, 282
153 .....	540, 758	1670 .....	220, 573
161 .....	540	1671 .....	220, 573
164 .....	540, 541	1674 .....	293
196 .....	465	1689 .....	500
196a .....	262, 264	1691 .....	46
361a .....	89, 90	1698 .....	221
377 .....	99	1861 .....	163, 164
685 .....	540	2607 .....	205
686 .....	540	2612 .....	205
1056 .....	521	2972 .....	310, 311
1066 .....	230	3005 .....	73
1084 .....	516	3006 .....	681
1104 .....	516	3307 .....	573
1304 .....	504	3313 .....	235
1492 .....	501	3391 .....	753
1614 .....	504	3408 .....	46
1615 .....	504	3479 .....	732, 733
1624 .....	56	3480 .....	732
1626 .....	213	3513 .....	469, 622
1636 .....	230		

## PENAL CODE.

SECTION	PAGE	SECTION	PAGE
7 .....	478	261 .....	434
19 .....	544	270 .....	464, 465
23 .....	661, 662	311 .....	731
31 .....	139, 140	338 .....	104
309 .....	137	339 .....	103, 105
311 .....	626	340 .....	103, 104

**PENAL CODE—Continued.**

SECTION	PAGE	SECTION	PAGE
476a .....	766	869 .....	627, 628
487 .....	83	1008 .....	768, 769
519 .....	617	1021 .....	478
523 .....	617	1052 .....	400
529 .....	18	1119 .....	394
538 .....	32, 33	1273 .....	328
543 .....	472, 568, 569	1291 .....	328
549 .....	568, 569	1323 .....	405
600 .....	474, 478	1345 .....	628
686 .....	543, 544, 545, 546	1382 .....	394, 777
647 .....	189	1387 .....	773
672 .....	35	1466 .....	776

**POLITICAL CODE.**

SECTION	PAGE	SECTION	PAGE
344 .....	118	4017 .....	121
379 .....	430, 431	4018 .....	117, 118, 119, 121
995 .....	428, 429, 430	4021 .....	117
996 .....	118, 427, 428, 429	4041 .....	118
3187 .....	697	4046 .....	123
3628 .....	695, 698	4075 .....	124
3680 .....	692	4076 .....	124
3735 .....	695	4149 .....	118
3787 .....	692, 696	4149b .....	118
3807 .....	695, 697	4300e .....	266
4013 .....	118	4468 .....	427

**IDAHO.**

Rev. Codes, sec. 1759. Tax Sale..... 694

**MASSACHUSETTS.**

Pub. Stats., c. 191. Mechanics' Liens..... 347

**WASHINGTON.**

Code, sec. 1543. Public Officers..... 423

**WISCONSIN.**

Stats. 1911, sec. 962. Public Officers..... 429

**REPORTS OF CASES**  
**DETERMINED IN**  
**THE DISTRICT COURTS OF APPEAL**  
**OF THE**  
**STATE OF CALIFORNIA.**

---

[Civ. No. 1935. Second Appellate District.—February 15, 1916.]

**CHARLES R. McCARTY**, Petitioner, v. **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**, IN AND FOR THE COUNTY OF LOS ANGELES, and the Honorable **FRED H. TAFT**, Judge Thereof, Respondents.

**APPEAL FROM JUSTICE'S COURT—EXCEPTION TO SURETIES ON APPEAL BOND—NOTICE OF MUST BE FILED WITH JUSTICE.**—A notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justice's court, in order to be effectual, must be filed with the justice.

**APPLICATION** originally made in the District Court of Appeal for the Second Appellate District for a Writ of Prohibition to restrain the Superior Court of Los Angeles County from proceeding with the trial of a certain action on an appeal from the Justice's Court.

The facts are stated in the opinion of the court.

**Niles Chapin Folsom**, for Petitioner.

**Pendell & Gleason**, for Respondents.

**JAMES, J.**—Application has been made on the part of the petitioner for a writ of prohibition to restrain the superior court from proceeding with the trial of a certain action, taken

on appeal from the justice's court of Los Angeles township to said superior court, and in which this petitioner is the plaintiff. The action was commenced in the justice's court on the 23d of February, 1915, and judgment was thereafter rendered against one Leuschner, the defendant. The defendant gave notice of appeal and undertaking on appeal in the amount required by law. As ground for the writ here sought it is alleged that the sureties on the undertaking on appeal failed to justify after exception had been taken to their sufficiency, and that therefore, under the provisions of section 978a of the Code of Civil Procedure, the appeal should have been dismissed by the superior court. A motion was made in the superior court, asking for an order dismissing the appeal for want of jurisdiction in the court to hear the matter because of the failure of the sureties to justify. Upon the alternative writ issuing, an answer was filed on behalf of respondents herein. One of the disputed questions between the parties was as to whether in fact service of notice of exception to the sureties was made. The petitioner here contends that he made such service by delivering the notice of exception to the defendant in the justice's court action, and the defendant contends that, as attorneys had appeared for him at the trial of the action in the justice's court, they were entitled to have the notice of exception to the sureties served upon them; that otherwise such service would be ineffectual. The defendant in the justice's court action further contends that, even though it might be lawful to serve a notice of exception to sureties on an undertaking on appeal on a defendant in person, in fact such service was not made. However, we are of the opinion, as this court has heretofore decided, that a notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justice's court, in order to be effectual, must be filed with the justice. (*Budd v. Superior Court*, 14 Cal. App. 256, [111 Pac. 628].) Nowhere in the petition filed herein is it set forth that the notice of exception to the sureties was ever filed with the justice, and referring to the certified copy of the justice's transcript which is attached to the answer of respondents, we find no record showing that any notice of exception was filed in the justice's court, or any papers at all referring to the sufficiency of the undertaking on appeal. In the case above cited, this court has intimated that it is not essential that such a notice of exception shall be served upon the party or his attorney, but that it must

be filed with the justice. The reasons upon which that holding is based are quite fully set forth in the opinion.

The application for a peremptory writ is denied.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1656. Second Appellate District.—February 28, 1916.]

**SAN DIMAS QUARRY COMPANY (a Corporation), Appellant, v. AMERICAN SURETY COMPANY OF NEW YORK (a Corporation), Respondent.**

**STREET LAW—RECOVERY UPON BOND—PLACE OF FILING STATEMENT OF CLAIM.**—In a case of street improvement work done under contract with a municipal corporation in accordance with the Street Work Act of 1885 (Vrooman Act) and amendments thereto, a claimant furnishing material therefor who seeks to recover on the bond given in connection with the contract must file his statement of claim, as directed by section 6½ of such act, with the superintendent of streets, and such a statement filed with the board of trustees and not delivered to such superintendent or filed in his office is not a compliance with such section, although the same was addressed to both the superintendent and board of trustees.

**ID.—PUBLIC WORK—FILING STATEMENT OF CLAIM—INAPPLICABILITY TO CONTRACTS UNDER VROOMAN ACT.**—The act of March 27, 1897 (Stats. 1897, p. 201), requiring mechanics employed upon public work who seek to recover upon the contractor's bond to file the statement of their claims with the board of trustees, is not applicable to work done under the Vrooman Act, as the adoption of section 6½ of such act (Stats. 1899, p. 23) in 1899 repealed the act of 1897 in so far as such act could be said to be applicable to work which came under the scope of such section.

**ID.—STATUTORY BOND—CONDITIONS OF RECOVERY.**—In an action to recover upon such a bond it is essential that the plaintiff show that all the requisites of the statute have been observed, as he cannot recover thereon as a common-law bond.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Eugene P. McDaniel, Judge presiding.

The facts are stated in the opinion of the court.

Flint, Gray & Barker, Gray, Barker & Bowen, and William A. Bowen, for Appellant.

A. J. Sherer, Arthur G. Baker, and W. M. Walker, for Respondent.

CONREY, P. J.—The plaintiff appeals from the judgment entered in this action in favor of defendant American Surety Company of New York, and also appeals from an order denying plaintiff's motion for a new trial.

On April 8, 1911, one L. H. McGowan, as contractor, entered into a contract with the street superintendent of the city of Covina for certain street improvement work. The contract was authorized and the work done in accordance with the Street Work Act of 1885, commonly known as the Vrooman Act, and the amendments thereto. In connection with the act of entering into this contract, and on the same date, the contractor, as principal, and the defendant American Surety Company of New York, as surety, executed a bond to the city of Covina, payable in the event that said principal should fail to pay for any materials furnished for the work of improvement described in the contract, or for any work or labor done thereon of any kind; and the bond by its terms was made for the benefit of any and all persons, companies, or corporations performing labor on or furnishing material to be used in said work of improvement. The plaintiff having furnished materials for that work and the principal having failed to pay therefor, this action was prosecuted to recover on the bond.

Section 61½ of the Vrooman Act was adopted in 1899, and requires the contractor to give a bond such as was given in this case. That section further provides: "Any material-man, person, company, or corporation, furnishing materials to be used in the performance of said work specified in said contract, . . . whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the

same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, . . . ” The court found, and the evidence shows, that appellant did not, within thirty days after said improvement was completed, or at all, file with the superintendent of streets any statement of its claim. It did, within said period of thirty days, prepare a statement of claim in due form and send it with a letter addressed to the board of trustees of the city of Covina. This letter, signed by an attorney of the plaintiff, stated that “We herewith file said claim with the board of trustees of the city of Covina.” The statement of claim was received by the city clerk, who opened it and placed it in the city’s safe, to which the president of the board of trustees and the clerk had access. The evidence shows that the statement of claim was not delivered to the superintendent of streets or filed in his office, that it was never in his possession or under his control, and that he did not even know of its existence until at least six months after it was received by the clerk.

There is another statute, approved March 27, 1897, entitled, “An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work.” (Stats. 1897, p. 201.) This act provides that “Every contractor, person, company, or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work,” file a bond as described in said act. The required provisions of the bond under this act and the purposes of the bond and the requirement as to giving of notice of claim prior to the commencement of any action thereon, are stated in terms almost identical with the language used in section 61½ of the Vrooman Act, but with one important difference. The act of 1897 (as in force when the bond sued on herein was made) required that a claimant seeking to recover upon such bond, “shall, within thirty days from the time such work is completed, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a verified statement,”

etc.; whereas section 61½ (enacted in 1899) of the Vrooman Act requires that the statement of claim be filed *with the superintendent of streets*.

Although the notice of claim in this case begins with the words, "To the Superintendent of Streets and Board of Trustees of the City of Covina, State of California," we cannot agree that the act of the plaintiff in filing it or sending it to be filed with the board of trustees was in any sense a compliance with the requirement of section 61½ that the claim be filed with the superintendent of streets. If section 61½ constitutes the law applicable to this case, it must be concluded that the plaintiff has failed to perform a necessary condition precedent to its right to recover against the surety on the bond.

Although the act of 1897 is quite general in its terms, it is at least doubtful whether it ever was intended to apply to contracts awarded under the terms of the Vrooman Act. Although contracts under the Vrooman Act are awarded by the city authorities and entered into by the superintendent of streets, the funds for payment of the contractor are obtained by special assessments levied against the property fronting upon the street, and are not paid out of the city treasury. *French v. Powell*, 135 Cal. 636, [68 Pac. 92], relied upon by appellant as an instance where a bond given to secure payment of claims arising out of the construction of a tunnel was held to be a bond given under the act of 1897, is not in point. The contract in that case was not made under the Vrooman Act, but was made by the city on its own behalf and the work was paid for out of the general funds of the city. But even if it be conceded that the act of 1897 at the time of its enactment was applicable to the case of street work done under the Vrooman Act, then we are of the opinion that the adoption of said section 61½ (approved February 21, 1899; Stats. 1899, p. 23) repealed the act of 1897 in so far as that act could be said to be applicable to work which came within the scope of section 61½. If such street work was included in the act of 1897, it was a special class of work distinct in character from work under contracts made and paid for directly by the state or any of its subdivisions. It was competent for the legislature to enact legislation particularly applying to this class of work. In so doing the legislature,

no doubt for sufficient reasons, determined that a claimant under the bond should file his claim with the superintendent of streets. Under this provision the surety on the bond, if it desired to know whether any claims had been filed under which it would be liable, would be entitled to examine the records of the office of the superintendent of streets at the expiration of thirty days from the time of completion of the improvement, to ascertain whether any claims had been filed. If it found no claims filed there, no duty devolved upon it to extend its inquiry to other city offices, and it might safely neglect to concern itself further with regard to the contract or bond, or with regard to the responsibility or solvency of its principal. To hold otherwise would be contrary to the plain purpose of enactment of section 61½.

Finally, counsel for appellant insist that it is entitled to recover upon the bond as a common-law bond, in which event it was not required to file notice of claim with any city officer. Upon this matter there was a conflict of authority which had not been settled when appellant's briefs were filed in this case. Since that time, however, the cases upon which it relies have been overruled. We refer to *Miles v. Baley*, 170 Cal. 151, [149 Pac. 45], decided by the supreme court of California on May 11, 1915. The bond in that case was given under the act of 1897 and in connection with a contract for the erection of a high-school building. Referring to *Union Sheet Metal Works v. Dodge*, 129 Cal. 390 [62 Pac. 41], and *People's Lumber Co. v. Gillard*, 136 Cal. 55, [68 Pac. 576], the court conceded that the opinions in those cases do tend to sustain the position that an instrument like the one there under consideration might be upheld as a good common-law bond without regard to the statute requiring the giving of a bond; and then, after discussing certain other decisions and the reasons therefor, definitely concluded that *Union Sheet Metal Works v. Dodge*, and *People's Lumber Co. v. Gillard* should, as to this particular question, be regarded as overruled.

In *Miles v. Baley*, 170 Cal. 151, [149 Pac. 45], it was distinctly stated that "if the instrument is a statutory bond, it was manifestly essential for the plaintiff to show that all the requisites of the statute vital to the support of an action upon the bond by materialmen, etc., had been observed by his assignors, and the silence of plaintiff respecting that vital

matter amounts to a total failure to state a cause of action upon the bond in favor of plaintiff or his assignors." The rule so stated is applicable in the case at bar.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

---

[Civ. No. 1930. Second Appellate District.—February 28, 1916.]

**CHARLES ORCHARDSON, Respondent, v. SHELDON  
CHRISTIE, Appellant.**

**CLAIM AND DELIVERY—PLEADING—DESCRIPTION OF PROPERTY—WAIVER OF OBJECTION.**—In an action in claim and delivery to recover certain oil paintings, where some of the paintings are not named in the complaint, but are definitely referred to as being pictures made by the plaintiff and at that time held in possession by the defendant, and it is alleged that the subjects thereof are not named and described, because they have escaped the memory of the plaintiff and that defendant has denied him access to the property, an objection to the complaint on the ground that the description of the paintings is insufficient should have been raised by demurrer for uncertainty, and it cannot be raised upon appeal, the complaint stating a cause of action and the defendant having met the issues by answering without demurrer.

**ID.—FORM OF JUDGMENT.**—A judgment in an action of claim and delivery providing, after ordering recovery of the paintings therein described, "that plaintiff is entitled to judgment for the sum of \$12,500 in the event that said pictures are not returned to the plaintiff herein by said defendant," but not using the original form of "do have and recover," etc., is sufficient, as the phrase "in the event that said pictures are not returned to the plaintiff herein by said defendant," is substantially the same as the statutory words, "in case the delivery cannot be had," when viewed in the light of the purpose of that provision in the statute.

**ID.—ALTERNATIVE JUDGMENT.**—While in such an action a judgment must ordinarily be in the alternative, one that is not is not void, and whether or not it is even erroneous depends upon the facts of the particular case.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Willis I. Morrison, Judge.

The facts are stated in the opinion of the court.

Kendrick & Ardis, for Appellant.

Andrew J. Copp, Jr., for Respondent.

CONREY, P. J.—This appeal is from the judgment and is presented on the judgment-roll. The action was brought to recover possession of 110 oil paintings and other pictures, of which the plaintiff was the owner and entitled to their possession, and which were wrongfully detained from him by the defendant.

Appellant's first point is that some of the pictures were not named in the complaint. The judgment purports to be for 105 of these pictures, and they are named in the judgment. Those which are not named in the complaint are definitely referred to as being pictures made by the plaintiff and at that time held in possession by the defendant and it is alleged that the subjects thereof are not named or described, because the subjects have escaped the memory of the plaintiff and that the defendant has denied him access to the property. This objection grounded on defects in description should have been raised by demurrer for uncertainty. The complaint stated a cause of action and the defendant met the issues by answering, without demurrer. (*Kelly v. Murphy*, 70 Cal. 560, [12 Pac. 467]; *Hawley v. Kocher*, 123 Cal. 77, [55 Pac. 696].)

Appellant next contends that the judgment should be reversed because it does not provide an alternative recovery for the value of the property in case a delivery cannot be had. (Code Civ. Proc., sec. 667.) The judgment, after ordering recovery by the plaintiff of the property therein described, states "that plaintiff is entitled to judgment for the sum of \$12,500, in the event that said pictures are not returned to the plaintiff herein by said defendant," but does not use the ordinary form of "do have and recover," etc. If this amounts to a money judgment, it complies with the statute. If it does not amount to a money judgment, it is difficult to see how the defendant is injured thereby, or how he can claim that there has been any miscarriage of justice which would entitle him to a reversal. The phrase, "in the event that said pictures are not returned to the plaintiff herein by said defendant," is substantially the same as the statutory words, "in case a delivery cannot be had," when viewed in the light of the purpose of that provision in the statute. That purpose is indicated in *Meads, Seaman & Co. v. Lasar*, 92 Cal. 221, 225, [28



Pac. 935], as follows: "The plaintiffs are not entitled to recover from the defendants the value of the property, unless they are unable to deliver it. The defendants are entitled to satisfy the plaintiffs' claim by a delivery of the property sued for, and can be compelled to pay its value only in case such delivery cannot be had." In *Keiser v. Levering*, 29 Cal. App. 41, [154 Pac. 281], decided by this court November 22, 1915, referring to the subject of form of judgment in actions to recover possession of personal property, we said: "In the earlier cases it was held to be imperative that the judgment be in the alternative form, and such judgments for possession only, without providing for a recovery of the value thereof in case delivery could not be had, were reversed even at the instance of the defendant. (*Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, [8 Pac. 605], and other cases.) But this rule was seriously questioned in *Claudius v. Aguirre*, 89 Cal. 506, [26 Pac. 1077], and *Erreca v. Meyer*, 142 Cal. 308, 310, [75 Pac. 826]. The law seems to be that, while the judgment must ordinarily be in the alternative, yet 'a judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case.' These later decisions might be sufficient to support a complaint and judgment for mere possession of property without regard to the value thereof, if the case as a whole appeared to be within the jurisdiction of the court." Upon the facts of this particular case, we are satisfied that the judgment contains no defect of form that can be of advantage to the defendant upon this appeal.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1634. First Appellate District.—February 29, 1916.]

**KEHRLEIN-SWINERTON CONSTRUCTION COMPANY**  
(a Corporation), Appellant, v. M. A. RAPKEN, Respondent.

**ACTION BY CORPORATION—FORFEITURE OF CHARTER—SUFFICIENCY OF AVERMENT IN ANSWER.**—In an action brought by a corporation for damages for breach of contract, the incapacity of the plaintiff to begin or maintain the action because of the prior forfeiture of its charter is sufficiently put in issue, in the absence of special demurrer, by the averment in the answer "that the plaintiff is not now, or was at the time of the filing of the complaint, a corporation organized or existing under or by virtue of the laws of the state of California or of any state, and that prior to the commencement of this action the said plaintiff, after due and regular proceedings for that purpose had forfeited its charter as a corporation and as such ceased to exist, and ever since said time has ceased to be a corporation."

**ID.—CORPORATION LAW—FORFEITURE OF CHARTER FOR NONPAYMENT OF LICENSE TAX—EVIDENCE.**—The only competent proof of the forfeiture of the franchise of a corporation for the nonpayment of its license tax is the Governor's proclamation declaring such forfeiture, or a certified copy thereof, and the certificate of the Secretary of the State as to certain data of record in his office is not sufficient proof thereof.

**ID.—SUBSTITUTION OF DIRECTORS AS PARTY PLAINTIFF—FORFEITURE OF CHARTER PRIOR TO ACTION BROUGHT—RIGHT OF CORPORATION.**—Where during the trial of an action brought by a corporation in its corporate name it is shown that the franchise of the corporation had been forfeited prior to the commencement of the action, the plaintiff has the right nevertheless to have the names of its directors as trustees substituted for its own name as party plaintiff.

**ID.—SUBSTITUTION OF TRUSTEES—WHEN PROPER.**—When in the course of an action it is brought to the attention of the court, either by the pleadings and proof of the defendant or by the suggestion of the fact on the part of the plaintiff, that the names of the trustees of the corporation should appear in the place of the corporation itself as party plaintiff, and when it clearly appears that the cause of action is unchanged and that the real parties in interest remain the same, and that the meritorious defenses of the defendant will be unaffected, and that the only purpose and effect of the proposed amendment is the mere formal change in the names of the party plaintiff without any change in the substantial rights and relations of the real actors in the case, the

court should order the substitution made, and it is an abuse of discretion to refuse to do so.

**ID.—STATUS OF DIRECTORS.**—The directors of every corporation, whether it has forfeited its charter or not, are the real persons and actors in actions begun by it or for its benefit, and this being so, it does not seem to be so material in what name they begin their actions so long as the identity of their act as the act of the corporation is undeniable.

**'APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order dismissing the action and from an order denying a motion to vacate such order. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Wm. M. Cannon, and Kingsley Cannon, for Appellant.

William G. Weiss, for Respondent.

**RICHARDS, J.**—This action was commenced by the plaintiff as a corporation against the defendant to recover the sum of six hundred dollars for the alleged breach of a contract in writing for the supplying by plaintiff to the defendant of certain labor and materials to be used in the construction of a building, which, it is alleged, were furnished but for which the defendant refused to pay.

The plaintiff averred its corporate existence in the usual form. The defendant denied this allegation and alleged "that the plaintiff is not now, or was at the time of the filing of the complaint, a corporation organized or existing under or by virtue of the laws of the state of California or of any state, and that prior to the commencement of this action the said plaintiff, after due and regular proceedings for that purpose had forfeited its charter as a corporation and as such ceased to exist, and ever since said time has ceased to be a corporation."

Upon the trial of the case, and after the plaintiff had proffered some of its proofs as to its cause of action, the defendant offered in evidence the certificate of the Secretary of State for the avowed purpose of showing that the plaintiff had forfeited its charter in the state of California in the year 1907, through the nonpayment of its license tax. The plaintiff objected to this offer; the court overruled such objection

and admitted the paper, which was in the ordinary form of a certificate by the Secretary of State as to the existence of the facts which the statute of 1908 provided as predicate for the proclamation of the Governor that the charters of certain delinquent corporations were from and after a specified date to be forfeited. Thereafter and toward the close of the trial the plaintiff offered some evidence showing that the directors of the plaintiff were Emil Kehrlein, Oliver Kehrlein, and Alfred Swinerton, and thereupon moved the court for an order of substitution of the names of said persons as parties plaintiff in place of the said corporation. This motion was denied by the court, which thereupon of its own motion entered an order dismissing the action, and also thereupon entered judgment in favor of the defendant and against the plaintiff and for costs.

Thereafter the plaintiff moved the court to vacate and set aside its order dismissing the action, which motion was denied.

From these two orders, and also from the judgment in defendant's favor and for costs, the plaintiff prosecutes this appeal.

Three questions are presented upon this appeal. The first of these has reference to the sufficiency of the defendant's answer in attempting to allege the incapacity of the plaintiff to begin or maintain this action because of the prior forfeiture of its charter, the averment of the answer in that respect being above set forth. While this averment is loosely and inartificially drawn, we think it is sufficient in the absence of a special demurrer to put in issue the forfeiture of the plaintiff's charter.

The next question relates to the form and sufficiency of the defendant's offered proof of such forfeiture occurring through the nonpayment of its license tax. While it may be true that the certificate of the Secretary of State will suffice to prove *prima facie* the existence or nonexistence of certain data of which his office is the only proper place of record—such, for example, as the fact of the nonpayment of the plaintiff's annual license tax—we have had our attention drawn to no statute which purports to make the certificate of the Secretary of State *prima facie* or any evidence of the contents of such a document as the Governor's proclamation declaring the forfeiture of the charter of such corporations as may have failed to pay such tax. In the absence of such a statute the



only proper proof of such a document would be the original or a certified copy of it, and this not having been produced, and the proclamation of the Governor being an essential step in the procedure for the forfeiture of the charter of such corporation as the plaintiff was, we are constrained to hold that the certificate of the Secretary of State was incompetent to prove the forfeiture of the plaintiff's charter for the nonpayment of its license tax. (*Murphy v. Sumner*, 74 Cal. 316, [16 Pac. 3]; 3 Jones on Ev., pp. 584, 585.)

The next contention of the appellant is that the court erred in denying the plaintiff's motion for leave to substitute the names of the trustees of the plaintiff corporation, and that the court committed the further error of thereupon dismissing the action.

The motion of the plaintiff for leave to make the substitution in the names of the parties plaintiff was made toward the close of the trial, and was necessarily predicated upon the proposition that the charter of said corporation had been forfeited for some cause and at some time prior to the time the motion was made, and since the only pretense of either pleading or proof of any kind presented in the case had reference to the state forfeiture of the plaintiff's charter to which the certificate of the Secretary of State related, it must be concluded that this was the forfeiture of its charter upon which the counsel for plaintiff predicated his motion. It might well be questioned whether the plaintiff, by thus assuming that the fact of the forfeiture of its charter had been sufficiently proven to form the basis for its said motion, has not waived the point as to the competency or sufficiency of such proof, but since upon a retrial of the case these defects may be remedied, we deem it proper to pass to what will ultimately prove to be the only vital issue in the case, which is the question as to whether plaintiff had the right to have the names of its trustees substituted for its own name as plaintiff during the trial and after proof or suggestion of the forfeiture of its charter prior to the commencement of the action.

There are two lines of cases which seem to run parallel bearing upon this question. The courts of last resort in this state have gone far in holding that corporations which have permitted themselves to come within the ban of the statute by failing to pay their license tax cannot be permitted to do business in this state while under such disability, and it has

also been definitely decided that the institution and maintenance of an action is embraced within the inhibition of the statute with respect to doing business after such forfeiture of a corporate charter. (*Crossman v. Vivienda Water Co.*, 150 Cal. 575, [89 Pac. 335]; *Kaiser L. & F. Co. v. Curry*, 155 Cal. 638, [103 Pac. 341]; *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, [128 Pac. 1040]; *Carpenter v. Bradford*, 23 Cal. App. 560, [138 Pac. 946].)

On the other hand, it has been held in a long line of well-considered cases bearing upon the rights of partnerships or of corporations to commence or maintain actions until they have complied with certain requirements of the legislature restricting such right, that the plea and proof that such partnerships and corporations may not maintain actions while under the disabilities provided in such statutes are matters of affirmative defense, and are in the nature of dilatory pleas, which are waived by the failure on the part of the defendant to make the required averments and proof; and that in the absence of such plea and proof a partnership or a corporation, although subject to such disabilities, may still maintain an action and recover and enforce a judgment therein in its own name. (*Bernheim etc. Co. v. Elmore*, 12 Cal. App. 85, [106 Pac. 720]; *California Sav. & Loan Soc. v. Harris*, 111 Cal. 133, [43 Pac. 525]; *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 576, [112 Pac. 454]; *Reed & Co. v. Harshall*, 12 Cal. App. 697, [108 Pac. 719].) In the case last above cited it was held that the court did not abuse its discretion in allowing the substitution of the names of the directors of the corporation as plaintiffs in lieu of the name of the corporation, after the defendant had set forth in his answer that the charter of the corporation had been forfeited through its failure to pay its license tax. (*Reed & Co. v. Harshall*, 12 Cal. App. 704, 705, [108 Pac. 719].)

In the recent case of *Lowe v. Superior Court*, 165 Cal. 709, 714, [134 Pac. 190], the supreme court, in considering section 10a of the act relating to the payment of the annual license tax by corporations (and which section was added to said act after some of the cases dealing with the forfeiture of corporate charters and its effect upon their right to sue or to be sued in the corporate name had been decided), held that under said section a corporation defendant, whose charter had been forfeited after the commencement of the action, might have the

suit against it maintained either in its own name or in the names of its trustees, and in so deciding the court commented upon the case of *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, [128 Pac. 1040], as not in conflict with this view.

In the still later case of *Brandon v. Umpqua L. & T. Co.*, 166 Cal. 322, [136 Pac. 62], the supreme court cited the *Lowe* case with approval, and went further in holding that even when the corporation was an actor after the forfeiture of its charter, as in the taking of an appeal, it could do so in its own name. It is true that in that case the court intimates that this rule would not apply to actions in which the corporation was the plaintiff, but this would only be to furnish a stronger reason why the trial court should permit the substitution of the names of the trustees for that of the corporation whenever the forfeiture of its charter for any cause is made to appear.

It is, however, urged by the respondent that this principle should not be given application to a case wherein the action has been begun by the corporation in its own name after its charter and right to do business has been withdrawn. But we think that this is a distinction which should not in the interests of justice prevail unless the language of the act is so clear and explicit as to require it. The present case is such an action as could well have been begun during the process of winding up the affairs of the defunct corporation, and which the statute expressly permits to be begun and maintained by the former directors of the corporation acting as trustees for its stockholders in thus seeking to collect its assets. An examination of the terms of section 10a of the license tax act will show that it is nowhere expressly stated or required therein that the trustees of the defunct corporation, in settling its affairs and in taking such legal proceedings as may be necessary so to do, must act in their own names instead of in the name of the corporation. The fact is that the directors of every corporation, whether it has forfeited its charter or not, are the real persons and actors in actions begun by it or for its benefit, and this being so, it does not seem to be so very material in what name they begin their action so long as the identity of their act as the act of the corporation is undeniable. This is the utmost that the defendant in actions of this character should have

the right to require for his own protection against the possibility of being twice vexed upon the same obligation.

A very interesting analogy involving the right and duty of the trial court to permit the substitution of the name of one plaintiff for that of another when no actual change is being effected in the real actors in the litigation is presented in the case of *Reardon v. Balaklala C. C. Co.*, 193 Fed. 189, the very apt language and citations of which have a direct bearing upon the principle involved in the case at bar.

When in the course of an action it is brought to the attention of the court, either by the pleadings and proof of the defendant or by the suggestion of the fact on the part of the plaintiff, that the names of the trustees of the corporation should appear in the place of the names of the corporation itself as a party plaintiff, and when it clearly appears that the cause of action is unchanged and that the real parties in interest remain the same, and that the meritorious defenses of the defendant will be unaffected, and that the only purpose and effect of the proposed amendment is the mere formal change in the names of the parties plaintiff without any change in the substantial rights and relations of the real actors in the case, the court should order the substitution made, and it was an abuse of discretion for the court to refuse so to do in the instant case.

It follows necessarily that upon both grounds above discussed the court was in error in dismissing the action and in causing judgment to be entered in the defendant's favor and for his costs. The motion to dismiss is denied.

The judgment and orders appealed from are reversed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 30, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 27, 1916.

[Crim. No. 508. First Appellate District.—February 29, 1916.]

**THE PEOPLE, Appellant, v. CHIN YOU, Respondent.**

**CRIMINAL LAW—IMPERSONATION—INFORMATION — ESSENTIALS OF.** — An information charging one with impersonating another should allege affirmatively the things required by subdivision 3 of section 529 of the Penal Code, or else it should appear from the act of impersonation that the injury or the benefit referred to in the section would have been produced.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco sustaining a demurrer to information. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and J. H. Riordan, Deputy Attorney-General, for Appellant.

Edward F. Moran, for Respondent.

**THE COURT.**—This is an appeal from an order sustaining a demurrer to an information, wherein the defendant was charged, under the provisions of subdivision 3 of section 529 of the Penal Code, with impersonating another person. The demurrer was grounded mainly upon the contention that the information did not state facts sufficient to constitute a public offense, because it did not, either expressly or by implication, allege that the impersonation by the defendant of another person had the effect of making the latter liable to any suit or prosecution, or to pay any sum of money, or to incur any charge or forfeiture, whereby any benefit might accrue to the defendant or to any other person.

We think that the information should have alleged affirmatively the things required by subdivision 3 of section 529 of the Penal Code, or else that it should have appeared from the act of impersonation that the injury or the benefit referred to in the section would have been produced; that is to say, there might be a case where the very act of impersonation itself would show upon its face that an injury or a benefit would accrue; but if it did not so show, then the

information should have alleged in express terms that that benefit or that injury did accrue or occur, as the case might be. We think the order appealed from should be affirmed, and that is the order.

---

[Civ. No. 1740. First Appellate District.—February 29, 1916.]

STUART A. HASSEY, Administrator, etc., Respondent, v.  
MARY A. RUGGLES, Administratrix, etc., et al.,  
Appellants.

**SAN FRANCISCO STOCK AND EXCHANGE BOARD—OWNERSHIP OF PROPERTY.** The property purchased by the San Francisco Stock and Exchange Board at an early date in the history of the association by contributions and fees of membership for the purpose of having a building for the convenience of the members and their business was in equity the property of such members, notwithstanding that the title thereto was taken in the name of a corporation composed entirely of such members known as the Company of Associated Stockholders, which had no other purpose for existence than to hold the legal title to the property and manage the same for the benefit of the members of the board.

**ID.—RELATIONSHIP BETWEEN MEMBERS AND BOARD—"SEAT."**—Under the articles of agreement creating the San Francisco Stock and Exchange Board, the rights and equities of its members with respect to the assets, and the particular advantages which accrued to each member thereof, were all comprised and defined by the terms "the seat and privileges of membership," and each member in good standing could dispose of his "seat," and with the consent of the board introduce his successor in interest into the body of its membership, and in case of the death of a deceased member the board itself was given the right and charged with the duty of disposing of the "seat" for the benefit of the widow and children of the deceased member; and in case of a delinquent member, the president of the board became invested with a trusteeship over the "seat," with power of disposition and of distributing the proceeds among those of his fellow-members who were creditors.

**ID.—DIVISION OF PROCEEDS — AGREEMENT OF LIVING MEMBERS — SHARE OF DECEASED MEMBER—WAIVER.**—The execution of a written agreement, after the sale of the property, by all the living members of the board to divide the proceeds of the sale among themselves and the representatives of deceased members, gives the representative of a deceased member, who did not sign such agreement, an equal advantage with one who did, where it appears that the former was

not given an opportunity to sign or participate in its benefits, as the execution of the agreement constituted a waiver on the part of the living members to any portion of the share of such deceased member.

**ID.—SALE OF PROPERTY—PROPORTIONATE SHARE OF PROCEEDS OF DECEASED MEMBER IN GOOD STANDING—DISTRIBUTION AMONG CREDITORS—ILLEGAL ACTION OF PRESIDENT OF BOARD.**—Upon a sale of the property of the San Francisco Stock and Exchange Board, the president of the board to whom was paid over, as trustee, the proportionate share of the proceeds of the sale belonging to a deceased member, has no right to distribute the same among the asserted creditors of the deceased, where such member was in good standing at the time of death and had not disposed of his "seat" in the board.

**ID.—ACTION TO RECOVER SHARE—FINDINGS—EQUITABLE INTEREST—CONTINUING SECURITY.**—In an action by the administrator of the estate of the deceased member of such board to recover the share of the proceeds of the sale to which said estate is entitled, the issue that under the constitution and by-laws of the association the equitable interests of every member therein shall be and remain a continuing security to all members of the board with whom he might deal for the performance of his contracts and the fulfillment of his obligations, is covered by the finding that the deceased was in good standing and owed no obligations to the members thereof.

**ID.—INDEBTEDNESS OF DECEASED MEMBER TO FELLOW-MEMBERS—IMMATERIALITY—EFFECT OF WAIVER.**—The question whether or not the deceased member at the time of his death was indebted to his fellow-members in any sum is not material, by reason of the waiver of any claim to any portion of the share of such member from the execution of the agreement.

**ID.—PARTY PLAINTIFF—SUBSTITUTION OF HEIR FOR ADMINISTRATOR.**—In such an action the defendants cannot contend that the administrator had no authority to bring the action, or that the judgment was in favor of a person not an original party to the action, by reason of the substitution of the only heir of the deceased as plaintiff without objection.

**ID.—JUDGMENT—MEMBERS OF BOARD AND PRESIDENT.**—A judgment in such action against all the members of the board as well as its president is proper, where it is shown that at all times such president was the authorized agent of the board.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Aitken & Aitken, for Appellants.

Cushing & Cushing, and Grant & Zimdars, for Respondent.

RICHARDS, J.—This is an action originally commenced by the plaintiff as the administrator of the estate of F. A. Hassey, deceased, against A. B. Ruggles and a number of other persons comprising the membership of the San Francisco Stock and Exchange Board, an unincorporated association, to recover the sum of four thousand dollars.

The facts out of which this alleged indebtedness arose are substantially undisputed. The San Francisco Stock and Exchange Board was organized in the year 1862 by the voluntary association of its members for the purpose of mutually facilitating the business in which they were severally engaged. Articles of agreement creating the association were adopted which formed, and still form, its constitution and by-laws, and set forth the object and functions of the association, the powers and duties of its officers, and the rights and privileges of its membership. By the terms of these articles of agreement it was provided that the legal title and ownership of all the property, effects, and assets of the association should vest in its officers in trust for the benefit and enjoyment of its members; that no member under any circumstances should be deemed to have or claim or possess any individual right, title, or interest in the property or assets of the association except when the same should be finally dissolved and its effects distributed among its remaining membership; that in the event of the death of a solvent member the board should dispose of his vacant seat to the best advantage for the benefit of his widow and children, or of those persons who should be designated by him in his last will and testament as entitled thereto, provided that no nominee of a retiring or deceased member should acquire any right to such seat or privileges of membership until elected thereto as provided by the constitution; that in the event of the suspension or delinquency of a member his seat and privileges of membership should revert to the board, the president of which was in such event constituted a trustee, with authority to sell the said seat and privileges of such delinquent member, and devote the proceeds of such sale to the discharge of the obligations to his

creditors among his fellow-members of the association. It was further provided that the seat and privileges of every member should be deemed and taken to be, as long as he remained a member, a continuing security to all members of the board with whom he might deal according to its rules for the performance of his contracts and the fulfillment of his engagements.

The record in the present cases discloses that F. A. Hassey became a member of the association a few years after its formation, and continued to be such member thereof up to the time of his death in the year 1897, and that at the said time of his death said F. A. Hassey was a member in good standing therein, and had not been suspended or declared delinquent, nor had his seat or privileges therein ever been sold either for the benefit of his heirs or his creditors among his fellow-members of the board, or otherwise. The record in the present case further discloses that at an early date in its history the association, desiring for the convenience of its members and their business a building, purchased a certain property, raising the purchase price therefor by contributions and fees of membership. At the time of this purchase it was deemed advisable to form a holding corporation in order to take the title and manage the said property. This was done; a membership corporation known as the "Company of Associated Stockbrokers" was formed, having no capital stock, and with its membership limited to the members of the San Francisco Stock and Exchange Board, and which corporation had no other purpose for existence than to hold the legal title to the property and manage the same for the benefit of the members of said board. The property thus purchased and held was retained until the year 1903, when it was sold for the net sum of two hundred and seventy thousand dollars. Thereupon the then living members of the San Francisco Stock and Exchange Board concluded to divide said sum of money among themselves and among certain successors of deceased members, and accordingly there was caused to be prepared and executed a receipt in the following form:

"San Francisco, Cal., July 24, 03.

"Received of the Company of Associated Stock Brokers the sum of three thousand dollars (\$3,000.00) being my proportion of the sum of \$270,000.00 distributed by the said com-

pany as part of the proceeds realized from its real estate on Pine street in San Francisco.

"And I do hereby ratify each and every act done by said corporation or its directors or officers in connection with said sale and distribution; and I hereby consent that in said distribution all of the owners of seats, whether delinquent or otherwise in the San Francisco Stock and Exchange Board, shall be recognized as entitled to participate in said distribution. And I hereby waive and release all interest in or claim to the proceeds of said sale except as paid to me herewith.

"(Signed)....."

Upon signing the foregoing receipt each of the members of the association executing the same received the sum of three thousand dollars, and every member of the association, or the representatives of the deceased members thereof, signed the said receipt and received the said sum of three thousand dollars as his or their proportionate share in the division of said larger sum of money, except the estate or legal representatives of F. A. Hassey, deceased, who were not given an opportunity to sign and execute said receipt and who received no portion of said sum of money. Instead, the said Company of Associated Stockholders paid over the sum of three thousand dollars, representing the Hassey share in the aforesaid division, to A. B. Ruggles, who received the same as the president of the San Francisco Stock and Exchange Board, and who, while admitting the receipt of said money, refused to pay over any portion thereof to the estate or legal representatives of F. A. Hassey, but, on the contrary, claimed and exercised the right to distribute the same among certain persons whom he asserted, and now asserts, to have been the creditors of said F. A. Hassey at the time of his death; and this action having been thereafter brought, he and his fellow-defendants herein undertook to justify such refusal and action on his part upon said ground and under the provisions of the constitution and by-laws of the association above set forth.

The trial court rendered judgment in favor of the plaintiff as the successor in heirship and interest of said F. A. Hassey, deceased, and against all of the said defendants for the said sum of three thousand dollars, with legal interest up to the time of such judgment; and from such judgment and the

order denying the defendants' motion for a new trial they prosecute this appeal.

The chief and, in fact, the only substantial contentions of the appellants herein are that the evidence in the case is insufficient to sustain the findings of the court, and that the findings in their turn do not support the judgment. A careful examination of the record, however, convinces us that the foregoing facts are fairly deducible from the evidence in the case, and they are substantially set forth in the findings with certain immaterial exceptions to be hereafter noted; and hence that the only real issue before us is as to whether the findings support the judgment.

The solution of this question will depend upon the answer to be given to the following inquiries: (1) What interest did F. A. Hassey have during his lifetime in the particular property of the San Francisco Stock and Exchange Board the title to which was held by the Company of Associated Stockbrokers, and from the sale of which the money was derived, for his proportionate share of which his successor in interest brings this action? (2) What effect did the execution of the receipt and agreement of the several members of the association other than F. A. Hassey, executed by them upon the distribution of said money, have upon his right or that of his successor in interest to recover in this form of action?

The relation between the members of the San Francisco Stock and Exchange Board and the Company of Associated Stockbrokers was considered in the early case of *Clute v. Loveland*, 68 Cal. 254, [9 Pac. 133], wherein it was decided that the property standing in the name of the latter corporation was in equity the property of the members of the said Stock and Exchange Board. This being the case, and the membership of said corporation being composed wholly of the membership of the said board, the existence and actions of the said corporation as to the holding or disposing of this particular property, and also as to the distribution of the proceeds of the sale thereof among the members of the said Stock and Exchange Board, who were at all times and in all forms the equitable owners thereof, becomes an immaterial factor; for the case stands as though the property at all times had been held in the names of the denoted officers of the Stock and Exchange Board who under its constitution and by-laws were invested with the title to all its property

in trust for the benefit of the membership of the unincorporated association. Under the articles of agreement creating the said Stock and Exchange Board, the rights and equities of its members with respect to the assets, and the particular advantages which accrued to each member thereof, were all comprised within and defined by the terms "the seat and privileges of membership." By its constitution and by-laws a retiring member in good standing could dispose of his seat and privileges of membership, and with the consent of the board might introduce his successor in interest into the body of its membership. In the case of a deceased member the board itself was given the right and charged with the duty of disposing of the seat and privileges of the deceased member for the benefit of his widow and children, or of those persons designated in his will as entitled thereto. In case of a member delinquent in the matter of keeping his contracts or paying his obligations as to his fellow-members, the president of the board became invested with a trusteeship over the seat and privileges of the said delinquent, with power to dispose of the same in the same manner that a person retiring while in good standing might dispose of his seat and privileges, and of distributing the proceeds of such distribution among those of his fellow-members who were his creditors. These provisions of the constitution bounded, defined, and limited the control of the members of the association over their equitable interest therein, and also bounded, limited, and defined the rights and powers of the board and its officers in respect of the equitable interests of delinquent members, as well as the method by which alone those powers and rights could be exercised. (*Shannon v. Cheney*, 156 Cal. 567, [105 Pac. 588].)

From this discussion the following conclusions logically result: If F. A. Hassey at the time of his death was a member of the board in good standing, and had not otherwise disposed of his seat and privileges therein, the board became invested with the right and duty of disposing of the same for the benefit of his widow and children or designated devisees; and in case the board failed to exercise this right or perform this duty, the heirs or successors in interest of said deceased could doubtless have compelled such action by some appropriate legal proceeding; and in such action the form in which the property of the board then was, whether real estate or money, would be

quite immaterial, for the reason that in every or any form it was comprised within the term by which the members of the board, in their articles of agreement creating it, had seen fit to define the equitable interests of each member therein, viz, "the seat and privileges of membership." So, also, in the case of a delinquent member, the only method by which his equitable interest in the properties and valuable privileges of the board could be distributed by the president of the board among those of his fellow-members who were his creditors was by a similar disposition of his "seat and privileges of membership," and any other method of disposing of or distributing the equitable interest of the delinquent member in the property of the board or in any portion thereof would be illegal as outside of the articles of agreement and beyond the power of the president of the board, who was invested with a trusteeship over the said equitable interest of such delinquent member in such property.

Applying these conclusions to the facts of the instant case, it would necessarily follow that the attempted action of A. B. Ruggles, as president of said board, in the way of distributing the sum of three thousand dollars which had come into his hands as the trustee of whatever equitable interest the successors of F. A. Hassey, deceased, had therein, among certain persons who were asserted to be creditors of said F. A. Hassey, deceased, was illegal, and hence ineffectual either to divest the said A. B. Ruggles of the said fund, either in his capacity as trustee thereof or as the authorized agent of said board in its possession, and was also ineffectual to relieve said A. B. Ruggles or his fellow-members of said board of his or their duty to account for the same to the successor in interest of said F. A. Hassey in some appropriate form of action.

At this point, however, another element enters into the case affecting materially the rights of the members of the San Francisco Stock and Exchange Board in their relation to each other, and to their equitable interests in that particular portion of the property of said association which was derived from the sale of the real estate held for their benefit by the Company of Associated Stockbrokers. After the sale of said property and receipt of said money by said holding company, the living members of the San Francisco Stock and Exchange Board, being also the entire membership of said holding company, entered into the agreement to divide said money among

themselves, and also among the representatives of deceased members, which agreement is evidenced by the receipt above set forth, and which said receipt and agreement was signed by every living member of said board and by the representatives of every deceased member thereof except F. A. Hassey; and thereupon, in accordance wherewith, every member of said board or his successor in interest, with this single exception, received his or their proportionate share of said money, amounting in each case to the sum of three thousand dollars. By the terms of this writing and by its execution, the provisions of the original articles of agreement between the members of the association with respect to their rights and interests in this property—or rather, in this particular portion thereof—were altered to the extent that whereas, under their original agreement no member of the association had any divisible interest in any specific portion of its property prior to its final dissolution, the members thereof now agreed and undertook to presently divide this particular sum of money among themselves. That the members of an unincorporated association may, by the consent of all their number and by an appropriate writing, thus alter the terms of their original articles of association there can be no doubt. And if it is claimed that F. A. Hassey or his successor in interest, not having signed or executed such agreement, may not have or take an equal advantage therefrom, the answer is twofold: First, the record shows that the successor in interest of F. A. Hassey, deceased, was not given an opportunity to sign or execute this agreement or to participate in its benefits; and, second, that notwithstanding this fact the plaintiff has chosen to assent to it, and has manifested that assent by the institution of this action. And it further appears by the terms of said receipt and agreement that it was expressly made broad enough to include every member of the association, living or dead, within its terms, and thus to give to F. A. Hassey or his successor in interest not only the same right to a distributive share of this money which all of his fellow-members undertook to exercise, but also to constitute a waiver on their part of all right or claim to any portion of his share in said fund. The defendants herein, having thus admitted the right of F. A. Hassey, whether delinquent or not, to his equal distributive share of said money, and having expressly surrendered by said writing all of their interest therein, cannot

now be heard to claim either that said distribution was illegal, or that the successor in interest of said F. A. Hassey is not entitled to receive the proportionate share thereof which would otherwise have been the share of F. A. Hassey had he been a living member of said association at the time of the distribution of said fund.

The appellants make the further contention that the findings of the court to the effect that F. A. Hassey was not indebted to any of his fellow-members of the association at the time of his death, and hence had no creditors to whom the president of the board could lawfully have distributed the money in question, are entirely unsupported by the evidence in the case. The record upon this subject shows that it is averred by the complaint, and admitted by the defendants in their answer, that F. A. Hassey was at the time of his death a member of the board in good standing. It is also admitted therein that the particular sum of three thousand dollars received by the president of the association represents the share in the larger sum to which F. A. Hassey would have been entitled had he been a member in good standing having no creditors among his fellow-members of the association at the time of the distribution of said fund. These being the defendants' admissions, the burden was unquestionably cast upon them to show a rightful distribution of this money to persons other than F. A. Hassey or his successor in interest, who not only claimed or were asserted to be his creditors, but who were actually proven to have been such existing creditors at the time of his death. No such proof was proffered by the defendants; no showing was made that any claims of such creditors had been presented to the estate of Hassey; no single creditor was produced to testify that he was such; no evidence of such debts was presented; and whatever was said by the witnesses for the defendants upon the subject of Hassey's creditors was so evidently hearsay as to amount at most to no more than the statement of these witnesses that there were some persons who claimed to be creditors of Hassey, but of what nature or legality, or in what amounts these claims consisted, was nowhere stated. Under such conditions it is clear that the finding of the court can be justified by the absence of proof upon the subject.

But beyond this it affirmatively appears by reference to the receipt signed by every member of the board other than F. A.

Hassey or his successor in interest, and hence by every person who could have been his creditor among its members, that each and all of them expressly waived and released all claim to any portion of said money, and agreed that whether delinquent or not, F. A. Hassey or his successor in interest was entitled to said distributive share of said fund. This being so, it became immaterial whether or not F. A. Hassey was indebted to his fellow-members of said board in any sum whatever at the time of his death, and hence it is immaterial what the court found upon that subject.

The appellants further maintain that the court has failed to find upon the issue presented in their answer that under the constitution and by-laws of the association the equitable interests of every member therein shall be and remain a continuing security to all members of the board with whom he might deal for the performance of his contracts and the fulfillment of his obligations. A reference to the findings will show that such a clause existed in the constitution and by-laws of the association; and if any further finding upon the subject was necessary, it was covered by the finding of the court that at the time of his death F. A. Hassey was a member in good standing in said association and owed no obligations to any members thereof.

The appellants further contend that under the constitution and by-laws of the board, the equitable interest of a member thereof in the event of his death was not given to the estate of the deceased member, but was to be disposed of by the board, the proceeds of such disposition to go immediately to his widow and children, or to his devisees in case of a will; and that this being so, they have been sued by a plaintiff in the person of an administrator of the estate of F. A. Hassey, deceased, who was not entitled to sue. The appellants also contend that the judgment in this case has been made to run in favor of a person not originally a plaintiff therein, to wit, Stuart A. Hassey.

In view of the fact that it is averred in the last amended and supplemental complaint, filed by the plaintiff herein without objection on the part of said defendants, that F. A. Hassey was a widower at the time of his decease, and that Stuart A. Hassey was his only child, and that by proper proceedings in probate his estate has been distributed to said Stuart A. Hassey as his only son and heir; and these aver-

ments being admitted to be true by the defendants through their failure to deny the same, it would seem that their two last-named contentions are inconsistent; for, even if it be conceded that, strictly speaking, Stuart A. Hassey, as administrator of his father's estate, was not entitled to commence this action, he was confessedly entitled to do so as the only child and heir of F. A. Hassey; and since without objection at the time on the part of the defendants he was permitted to correct this error, if any, by the substitution of his name as plaintiff in his own right in his final pleading, we think that neither of the foregoing contentions of the appellants can now be maintained.

The appellants have presented a large number of assignments of errors of law on the part of the court committed during the trial; but an inspection of the record will reveal that the asserted merit of each of these assignments depends upon the acceptance of the appellants' theory of the case, which neither the trial court nor this tribunal has seen fit to adopt, and that otherwise there is no merit in any of these.

Finally, the appellants assert that the judgment herein should not have been rendered against any of the defendants other than the defendant Ruggles, for the reason that he is the only one of the defendants who is shown to have received the said sum of three thousand dollars; but the record shows indisputably that said Ruggles, at the time he received and claimed the right to disburse the said sum, was the president and authorized agent and representative of the entire membership of the board in so receiving and disbursing the same, and hence that for his action in the premises the members of the board must individually and collectively be held responsible.

No substantial error appearing, the judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 27, 1916.

[Crim. No. 455. Second Appellate District.—March 1, 1916.]

**THE PEOPLE, Respondent, v. E. J. PHILLIPS, Appellant.**

**CRIMINAL LAW—LARCENY—SALE OF MORTGAGED PERSONAL PROPERTY—**

**SUFFICIENCY OF EVIDENCE.**—In a prosecution, under section 538 of the Penal Code, for selling mortgaged personal property consisting of heifers and cows without giving the requisite notice to either the mortgagee or the purchaser, where there was testimony relevant and competent to support the allegations of the information as to all material matters charged therein, the appellate court cannot revise the finding of the jury on the questions of fact.

**Id.—ALLEGED BIAS OF JUDGE—CONFLICTING EVIDENCE.**—The contention in such a case that the trial judge was disqualified by reason of bias and prejudice on the ground that in a similar charge against the defendant, after conviction, and when probation was being applied for, he refused to approve an order for probation, and gave it as his opinion in that connection that the defendant should, for the offense there considered, be placed in the penitentiary, cannot be sustained on appeal, where affidavits of the deputy district attorney and the trial judge were filed contradicting the assertion of appellant as to any improper bias or prejudice.

**Id.—CONSTRUCTION OF SECTION 487, PENAL CODE—LARCENY.**—By section 487 of the Penal Code, when property stolen is a cow, calf, etc., the crime is declared to be grand larceny, and, within the meaning of this section, "heifer" is synonymous with "cow," and it follows, therefore, that if, as section 538 of the Penal Code declares, the selling of mortgaged property without the prescribed notice makes the person guilty of larceny and makes him "punishable accordingly," the crime is either grand or petty larceny, dependent upon the kind or value of property taken.

**Id.—INSTRUCTION—INTENT.**—In such a case, there was no error in instructing the jury that the intent with which the act alleged was done was not an element of the offense, and that when the intent is not made an affirmative element of the crime, the law interprets that the act knowingly done was of criminal intent, and it need not be alleged or proven.

**Id. — CONSTRUCTION OF INSTRUCTIONS — RULE.** — Instructions are to be read in their entirety and not by segregated and separate portions; and although a single instruction in such a case, if it stood alone, might be susceptible of the interpretation that its language assumed that the facts charged against the defendant had been proved, where, in the body of the instructions given by the court, the jury was advised that it must find beyond a reasonable doubt all the allegations set forth in the information to be true, it cannot be contended that the instruction was prejudicially erroneous.

**ID.—CONSENT TO SELL ALL OR PART OF MORTGAGED PROPERTY—FAILURE TO GIVE NOTICE OF SALE OF BALANCE—INSTRUCTION.**—There was no error in instructing the jury in such a case that if they should find that the defendant sold either or all of the five animals described in the information, they should convict him, although there was testimony given on the part of the mortgagee to the effect that he had authorized the mortgagor to sell two of the cows, where the information contained a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold.

**ID.—PERMISSION TO SELL—RIGHT TO NOTICE.**—The giving of mere permission to sell mortgaged property does not work a waiver of the right to have notice of the sale furnished, for the mortgagor has a full right to sell without permission, provided he gives the notice prescribed by the statute.

**ID.—PUNISHMENT—IMPRISONMENT AND FINE—CONSTRUCTION OF SECTION 672, PENAL CODE.**—Under section 672 of the Penal Code, upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed in said code, the court may impose a fine on the offender not exceeding two hundred dollars in addition to the imprisonment prescribed; and it was not error for the court in such a case to impose a fine of two hundred dollars, as well as imprisonment in the state's prison for a period of three years.

**APPEAL** from a judgment of the Superior Court of Imperial County, and from an order denying a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

O. V. Willson, and W. F. Frazier, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**JAMES, J.**—Appeal from a judgment of imprisonment and from an order denying defendant's motion for a new trial.

Defendant was prosecuted agreeable to the provisions of section 538 of the Penal Code, which makes the mortgagor of personal property, who sells or transfers the same to another, guilty of larceny, where he fails to inform the person to whom the sale is made of the existence of the mortgage and also fails to give written notice to the mortgagee of such intended sale.

The property in question, which was subject to the lien of a chattel mortgage and which it is alleged the defendant sold without giving the requisite notice to either the mortgagee or the purchaser, consisted of three heifers and two cows. The judgment of the court, as entered upon the verdict, was that the defendant be imprisoned in the state prison for a period of three years, and that he pay a fine in the sum of two hundred dollars.

Referring to the evidence, the sufficiency of which is challenged by appellant, it will be sufficient to say that there was testimony relevant and competent to support the allegations of the information as to all material matters charged therein. Under such a state of the case, it is not for this court to revise the finding of the jury on the questions of fact.

Appellant contends that the showing made by him of alleged disqualification of the trial judge as to bias and prejudice, should have been sustained. It appears that the appellant had been a defendant in another case under a similar charge, and that, after conviction and when probation was there being applied for, the judge, being the same judge who sat at this trial, refused to approve an order for probation, and gave it as his opinion in that connection that the defendant should, for the offense there considered, be placed in the penitentiary. Affidavits of the deputy district attorney and of the trial judge were filed, which contradicted the assertion of appellant as to any improper bias or prejudice.

It is urged that defendant should not have been convicted of the crime of grand larceny, because the section of the code under which he was prosecuted makes the commission of the acts charged amount only to "larceny." In section 538 of the Penal Code it is provided that any person who shall commit any of the acts therein described shall be "guilty of larceny and . . . punishable accordingly." The property which was the subject of the chattel mortgage, as alleged in the information, consisted entirely of cows and heifers. By section 487 of the Penal Code, when the property stolen is a cow, calf, etc., the crime is declared to be grand larceny. We think that within the meaning of this section, "heifer" is synonymous with "cow," and it follows, therefore, that if, as section 538 of the Penal Code declares, the selling of mortgaged property without the prescribed notice makes the person guilty of larceny and makes him "punishable accord-

ingly," the crime is either grand or petty larceny, dependent upon the kind or value of the property taken.

The court charged the jury that the intent with which the act alleged was done was not an element of the offense, and then proceeded to state that "when the intent is not made an affirmative element of a crime the law interprets that the act knowingly done was of criminal intent, and it need not be alleged or proven." That instruction was in accordance with the law as laid down by this court in *People v. Phillips*, 27 Cal. App. 409, [150 Pac. 75]. It is complained that in the same instruction the court by its language assumed that the acts charged against the defendant had been proved. If the instruction pointed to stood alone, it might be susceptible of such interpretation, but in the body of the instructions given by the court the jury was advised that it must find beyond a reasonable doubt all of the allegations set forth in the information to be true. Instructions are to be read in their entirety, and not by segregated and separate portions. It is complained, again, that where the court instructed the jury that if it should find that the appellant sold either or all of the five animals described in the information, it should convict him, error was committed, because there was testimony given on the part of the mortgagee to the effect that he had authorized the mortgagor to sell two of the cows. The information contains a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold. Furthermore, the giving of mere permission to sell does not work a waiver of the right to have notice of the sale furnished, for, as is properly stated by the attorney-general, the mortgagor has a full right to sell without permission, provided he gives the notice prescribed by the statute. We have examined each of the instructions offered by the appellant and which were not given. These instructions mainly went to the question of intent, and in view of what has been said herein upon that proposition, the refusal of the court to so declare the law did not amount to error of which the appellant has a right to complain. As before stated, the questions of fact proposed by the allegations of the information were submitted to the jury, and the jury made its finding thereon. There being material evidence to support the allegations, that finding forecloses any further inquiry into that matter.

Appellant made the point that the law did not permit of the imposition of a fine in addition to a sentence of imprisonment, and has referred to the section of the Penal Code fixing the punishment for grand larceny. Upon our first examination of the case, no answer being made on behalf of the attorney-general to this point, it seemed that the objection to that portion of the judgment which imposed the fine of two hundred dollars was well taken. However, our attention has now been called to section 672 of the Penal Code, which is a section general in its nature and which provides as follows: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed." Under the terms of this section it would seem that the court had the discretion to add the fine in the sum mentioned in the judgment to the sentence of imprisonment.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 27, 1916, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the second district is denied.

In denying the application we do not wish to be understood as holding that if permission to sell was given by the mortgagee, it would not operate as a complete waiver of the requirement of the statute that notice of the sale shall be given to the mortgagee. We express no opinion upon that question. The complaint that error was committed in the giving of an instruction bearing on this question was sufficiently answered by what is said in the opinion of the district court of appeal that "the information contained a two-fold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold."

[Crim. No. 335. Third Appellate District.—March 1, 1916.]

**THE PEOPLE, Respondent, v. JOE JOY, Appellant.**

**CONSTITUTIONAL LAW—LOCAL OPTION ACT—FURNISHING OF ALCOHOLIC LIQUORS IN NO-LICENSE TERRITORY—SUFFICIENCY OF TITLE OF ACT.—**

The act of 1889, entitled "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option, . . . making it a public offense to sell, give away or distribute alcoholic liquors within such territory [no-license territory], with certain exceptions, and providing penalties for such offenses," is sufficiently comprehensive and accurate to warrant the provision in the body of the act, making it unlawful to "furnish" liquor within no-license territory.

**1d.—OBJECT OF CONSTITUTIONAL PROVISION.**—The object of the constitutional provision requiring every act to embrace but one subject, which shall be expressed in its title, is to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another; and it must receive a reasonable, and not a narrow or technical, construction.

**1d.—FURNISHING AND GIVING AWAY LIQUOR IN NO-LICENSE TERRITORY—SUFFICIENCY OF INFORMATION.**—An information charging a defendant with the offense of unlawfully "furnishing, distributing and giving away" alcoholic liquors in no-license territory is not defective in and to the extent that it contains the word "furnish," and where the evidence shows that the defendant "gave" the liquor away, the use of the word "furnish" may be disregarded as involving nothing more than mere abstract error, if error at all.

**APPEAL** from a judgment of the Superior Court of Yolo County, and from an order denying a new trial. W. A. Anderson, Judge.

The facts are stated in the opinion of the court.

J. E. Strong, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

**BURNETT, J.**—Defendant was convicted of the offense charged as follows: "The said Joe Joy, of Woodland, on or about the 20th day of October, 1915, and within the boundaries of the city of Woodland, county of Yolo, state of Cali-

fornia, then and there being, did then and there willfully and unlawfully furnish, distribute and give away alcoholic liquors, and the said city of Woodland then and there being an incorporated city and no-license territory," etc.

It is not disputed that said city constitutes no-license territory, and that the prosecution was had under section 13 of Statutes of 1911, page 602, providing that "It shall be unlawful for any person, corporation, firm, company, association or club, as principal, agent, employee or otherwise, within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof."

The principal contention of appellant is that said statute and also the information filed by the district attorney are broader than the title of said act permits, and, therefore, unwarranted in and to the extent that each contains the word "furnish."

The title of said act, as far as necessary to quote here, is: "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option, . . . making it a penal offense to sell, give away or distribute alcoholic liquors within such territory, with certain exceptions; and providing penalties for such offenses."

It is settled that the title of an act may be general, and need not embrace "an abstract or catalogue of its contents": (*Abeel v. Clark*, 84 Cal. 226, [24 Pac. 383]; *Estate of McPhee*, 154 Cal. 385, [97 Pac. 878]; *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, [129 Pac. 989]; *Matter of Coburn*, 165 Cal. 202, 211, [131 Pac. 352].)

The object of the constitutional provision requiring every act to embrace but one subject, which shall be expressed in its title, is to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another; and it must receive a reasonable and not a narrow or technical construction. (*Abeel v. Clark*, 84 Cal. 226, [24 Pac. 383].)

Within the spirit of the foregoing declarations it must be held that the provision in the title in reference to the regulation of the traffic in alcoholic liquors in no-license territory is sufficiently comprehensive and accurate to warrant the inhibition of the statute directed against the furnishing of

liquor therein. Many cases illustrating the application of the principle have been cited by the attorney-general, but it is sufficient to refer to *Parkinson v. State*, 14 Md. 184, [74 Am. Dec. 522], wherein the subject is learnedly discussed, and the court held that the title, "An act to prohibit sale of intoxicating liquors to minors" was sufficient to justify the provision in the body of the act making it unlawful "to sell, dispose of, barter or give" such liquors to minors, "as being the means to effect the chief design of the act as expressed in the title." The case is reported, with an interesting note attached thereto, in 74 Am. Dec. 522.

Appellant also complains of an instruction given by the court following the language of the information and containing the word "furnished," but the objection to the instruction is similar to that urged against said information, and it has no good reason in its support.

The definition given by the court of the word "furnish" is also criticised by appellant, but it seems to be in accordance with the standard lexicographers, as follows: "To supply; to offer for use, to give, to hand."

Moreover, it must be apparent from the testimony in the case that the foregoing discussion—brief as it is—might well be eliminated. The evidence shows that the appellant gave the liquor away. In fact, it is not disputed that there is sufficient showing of the violation of the law in that respect. The whole consideration as to the word "furnish" may be disregarded as involving nothing more than mere abstract error which could not have prejudiced appellant. Assuming that the law improperly contains the word "furnish," and the information was defective in the same respect, it simply presents an instance of redundancy, and the conviction of the offense of giving away the liquor, which was properly charged, is not affected.

We can see no shadow of merit in the appeal, and the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1690. First Appellate District.—March 2, 1916.]

**FRANK COELHO, Respondent, v. JUDSON MANUFACTURING COMPANY (a Corporation), Appellant.**

**NEGLECT—ACTION FOR LOSS OF SIGHT OF EYE—EVIDENCE.**—In an action for damages for the loss of the sight of an eye caused by the penetration of a chip of steel, through the alleged negligence of the defendant, it was not prejudicial error to refuse to allow, upon cross-examination of an oculist, who had attended the plaintiff for several weeks and was testifying upon his behalf, questions as to whether the injury would interfere with the labor activity of an ordinary laboring man, or would interfere with his work as a factory man, or such work as plaintiff was doing, chipping steel with a sledge-hammer, or whether plaintiff would be able to see a chart used by the optician with figures upon it, where the witness had testified that he had made physical tests of the plaintiff, but not with these charts, and he had told the jury what tests he had made and the extent of the injuries—the jury then being in as good position as the witness to know to what extent the injury to the plaintiff's eye impaired his ability to earn a livelihood.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Hon. James W. Bartlett, Judge presiding.

The facts are stated in the opinion of the court.

Myrick & Deering, and James Walter Scott, for Appellant.

J. Leonard Rose, and St. Sure, Rose & Callaghan, for Respondent.

**THE COURT.**—The action was brought by the plaintiff to recover damages for the loss of the sight of his right eye, occasioned by its penetration by a chip of steel, brought about through the alleged negligence of the defendant. As the result of a trial before a jury judgment was entered in favor of the plaintiff for the sum of \$1,250. The appeal is by the defendant from the judgment and from an order denying its motion for a new trial.

Several points are discussed in the briefs, but at the oral argument counsel for the defendant stated that the defendant

relied upon but one of those points for a reversal of the judgment, viz., that the trial court committed prejudicial error in refusing to allow the following questions on the cross-examination of an oculist, who had attended the plaintiff for about five weeks and was produced as a witness in his behalf.

(1) "Do you consider the wound one that would interfere at all with the labor activity of an ordinary laboring man?"

(2) "Do you consider that it would interfere with his work as a factory man, for example?"

(3) "Would it interfere with such work as he was doing, chipping steel with a sledge-hammer?"

(4) "Take one of the ordinary charts used by opticians, with figures upon it, would he be able to see that chart?"

We cannot agree with the contention of defendant. The testimony of the witness to which the last of the above enumerated questions was directed was in substance as follows: "I made a physical test, asking to see if he saw my fingers and saw my features and so forth, and I understood the answers to be yes. . . . I did not make any of these chart tests while I was treating him." So that it appeared that the witness himself had not ascertained whether or not the plaintiff could see the figures on the ordinary chart used by opticians, and he had just told the jury what tests he had made. They were therefore in as good position to judge whether he could see the figures on such a chart as was the witness himself.

Likewise as to the other questions. The expert had testified fully on direct examination as to the nature and extent of the injury; and it therefore seems to us that the jury were, so far as this expert witness was concerned, in possession of sufficient facts to enable them to know to what extent the injury to the plaintiff's eye impaired his ability to earn a livelihood.

The judgment and order are affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on March 31, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1916.

[Civ. No. 1371. Third Appellate District.—March 2, 1916.]

**UNITED MOTOR SAN FRANCISCO COMPANY, Appellant, v. W. C. CALLANDER et al., Respondents.**

**SALE OF TOURING CAR—FRAUD—RESCISSION—INABILITY TO RESTORE CAR TAKEN IN EXCHANGE.**—A vendee under a contract for the purchase and delivery of a new touring car is not deprived of his right to rescind the contract upon discovery that the car received by him was not a new car, because of the fact that the vendor had resold the car of the vendee, which he received in part consideration of the sale, notwithstanding the vendee had knowledge that the vendor intended to, and did, sell such car.

**ID.—LIABILITY OF VENDOR—DAMAGES.**—Under such circumstances, the vendor must make good in damages the value of the car which it cannot restore, and this it may be required to do in the action for rescission.

**ID.—PROMPTITUDE IN RESCISSION—CONSTRUCTION OF CODE.**—The first requisite of rescission is prompt action, and subdivision 1 of section 1691 of the Civil Code is mandatory as to the promptitude required, except as to the cases therein enumerated, and others where a sufficient showing is made in excuse for the delay.

**ID.—USE OF CAR—EVIDENCE—PROMPT RESCISSION.**—In an action to recover on the promissory note given as part consideration of the sale, it cannot be contended that the vendee failed to rescind the contract within a reasonable time, from the fact that he made no attempt so to do until two days before his note fell due and after he had used the car almost a month, where it is made to appear that he received the car under a warranty of a reputable firm that it was a new car, and that he was about to become the agent for the sale thereof in the locality.

**ID.—REMOVAL OF PARTS OF CAR BY VENDEE—EXHIBITS IN COURT—RESCISSION UNAFFECTED.**—The defendant in such action is not precluded from asserting his right to rescind on the ground that he exercised acts of ownership over the car inconsistent with his claim that he was holding it subject to plaintiff's order, where such acts consisted in taking off the wheels, detaching some parts of the car, and bringing them into court as exhibits at the trial, while the car was in the custody of the sheriff under attachment, in the absence of any showing that the car was injured or its value impaired by the temporary removal of such parts, or that the defendant was prevented thereby from delivering the car to the plaintiff as the court directed, on compliance by plaintiff on its part with the judgment of the court.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

William M. Cannon, and Kingsley Cannon, for Appellant.

J. W. Hawkins, for Respondents.

CHIPMAN, P. J.—Plaintiff brought the action to recover upon a promissory note executed by defendants at the town of Manteca, San Joaquin County, December 23, 1911, for the sum of six hundred dollars, with interest at seven per cent per annum, principal due thirty days after date. Where in this opinion we use the singular number for one of the defendants, reference will be to defendant W. C. Callander.

In their answer defendants admit the execution of the promissory note, and as defense thereto alleged that "on or about December 23, 1911, plaintiff and defendant W. C. Callander entered into a contract whereby the plaintiff promised to sell and deliver to said defendant one new, 1912 model, Sampson, 35 horse-power, five passenger, fore-door touring car in consideration of said defendant delivering to the plaintiff one Flanders runabout, \$350.00 in cash, and his promissory note for \$600.00 signed by said defendant and his wife, Mrs. W. C. Callander"; that, pursuant to said contract, defendant paid plaintiff \$350, delivered said Flanders runabout, and executed said promissory note signed as aforesaid, all of which was upon the agreement that plaintiff would deliver said Sampson car of the description above given; that plaintiff failed and refused to deliver to defendant the car so promised by plaintiff, but did deliver a car of the description mentioned except that it was not a new car; that it was an old, used car, "and had become worn, and the parts thereof had become weakened, crystallized, broken and worn . . . and had been repainted by plaintiff for the purpose of concealing the fact from defendant that said touring car was an old car . . . and defendant was unable, at the date of the delivery of said car to him, to ascertain or perceive the worn, weakened, crystallized and broken condition of said car by reason" of its being so painted and varnished; that, on January 20, 1912, defendant discovered that said car was not when

delivered a new car and was in the condition above described, and thereupon defendant notified plaintiff that said car was not new, but was an old car, and defendant "offered and tendered to plaintiff the return of said car and demanded that plaintiff return to defendant said Flanders runabout, the said note and \$300.00"; that said demand was in writing, and by mistake three hundred dollars was demanded instead of \$350; "and in said demand the said defendant rescinded the contract had by and between the said plaintiff and the said defendant"; that plaintiff refused, and still refuses, to comply with either of said demands, "or deliver up or cancel said promissory note."

"By way of cross-complaint and for affirmative relief," defendants set up substantially the foregoing facts. It is also alleged that defendants have been at all times ready and willing, and are now ready and willing and able, to deliver to plaintiff, and do tender to plaintiff, the said Sampson car; that there was no consideration for said promissory note, the consideration therefor having failed.

A second cross-complaint is pleaded by defendant W. C. Callander alone which contains the same averments as are found in the first cross-complaint of defendants.

The prayer is that plaintiff take nothing by its action; that plaintiff be required to deliver up the said Flanders runabout to defendant, and be required to pay the defendant the sum of \$350 and to surrender up and cancel said promissory note, and that defendant recover damages in the sum of five hundred dollars, and for general relief.

The cause was tried without the intervention of a jury. The findings of fact were in favor of defendants and were substantially as alleged in the answer and cross-complaint. As conclusions of law the court found "that defendants are entitled to judgment against plaintiff on their cross-complaint for the sum of \$350.00 cash paid by them at the time of the delivery of said Sampson automobile, to wit: December 23, 1911," with interest from that date, "for the delivery of said Flanders runabout, and if that cannot be returned in substantially as good condition as when delivered for the sum of \$350.00, its value at the time of delivery"; also for the cancellation of said note for six hundred dollars and for their costs of suit; that plaintiff take nothing, and "that defendants shall return and deliver up to the plaintiff at

Manteca, California, the said Sampson automobile." Judgment was accordingly entered, from which and from the order denying its motion for a new trial plaintiff appeals.

While protesting that the evidence by a "vast preponderance" was in favor of plaintiff, counsel say in their brief that, "although we shall, under compulsion of the well-known rule of appellate practice, assume the car to have been an old one, we must nevertheless insist that it is an assumption contrary to the fact, and that this court for this reason should look with kindlier favor upon the equitable rules of laches, estoppel, and *statu quo* upon which we here rely in denial of the correctness of the court's finding that a rescission was established."

This concession renders it unnecessary to state the evidence in support of the findings that plaintiff willfully concealed the fact upon which defendants relied that the car was a new one and fraudulently obtained the promissory note, the subject of the action.

Plaintiff's first point is that the evidence does not support the finding that a rescission was established, for the reason "that the transaction was a tripartite one, involving a barter with a third person not a party to the action." The sale was made for plaintiff by its agent, Hastings, who delivered the car to defendant at Manteca. On his cross-examination as a witness defendant testified: "I know that that Flanders car was sold the same day I turned it over to the plaintiff. It was sold that same day in Manteca to Mr. Hooper. I knew that as soon as Mr. Hastings took the Flanders from me he was to take it right around and sell it to Mr. Hooper. It was all part of the same transaction, and Mr. Hastings was to get a Reo runabout from Mr. Hooper." Plaintiff relies upon *Bailey v. Fox*, 78 Cal. 389, 397, [20 Pac. 868], which was an action for rescission of a contract for the sale by defendant to plaintiff of a one-third interest in a stock of hardware and agricultural implements. At the same time defendant sold a like interest to one Meinke, and each then became owner of one-third interest in the stock of goods, and, as part of the agreement, the three formed a copartnership to carry on the business, which by the agreement was to continue for three years. An inventory was taken, and in November the partners entered upon the business and conducted it together until the following May, selling the old stock and replenish-

ing by purchase of new, when plaintiff claimed to have discovered that the representations made to him and on which he acted were false, and sought rescission. Said the court: "The tender was not of the goods purchased, as a great part of them had been sold. The offer was to deliver the goods on hand, and pay the amount realized from the sale of those disposed of. This was not sufficient. Upon rescission, the defendant, before paying back the purchase money and delivering up the notes, was entitled to receive the identical things sold. He was not bound to take the price at which they were sold. That might, so far as we know, have been less than their value. But whether it was or not, the rule is well settled that where the party complaining has parted with the thing purchased, he cannot rescind, but must resort to damages." It was also pointed out that, when the offer to rescind was made, "it had become impossible by the act of the plaintiff himself, or jointly with the other active partner, to place the defendant *in statu quo*. As a result of the sale, a partnership had been formed, as we have stated, and the whole stock had become partnership property, in which Meinke, who was not made a party to this action, had an interest. A large part of the stock had been sold, and new stock purchased on credit, for which the defendant as well as the other partners were personally liable. This being the situation of affairs, it was utterly impossible to place any of the parties *in statu quo*. It is well settled that under such circumstances there can be no rescission of the contract." In the case here defendant is in position to tender, and he has tendered, all the property he received from plaintiff. The case we have just been considering furnishes no support to the proposition that because plaintiff sold the Flanders car and cannot restore it, the defendant has lost his right of rescission. Plaintiff received this car, as it did the cash and the promissory note, in part consideration of the sale of the Sampson car. That defendant knew plaintiff intended to and did sell the Flanders car was no part of the inducement to defendant in purchasing the Sampson car, and formed no part of the contract. In rescinding, defendant "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do

so." (Civ. Code, sec. 1691, subd. 2.) Plaintiff not only is unable, but has positively refused, to restore all or any part it received. But it cannot avoid its duty by itself creating this disability. In such a case it must make good in damages the value of the part of the property it received and cannot restore, and this it may be required to do in the action for rescission.

Section 3408 of the same code provides: "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Plaintiff has asked for no reciprocal or compensatory relief, nor in equity could it reasonably seek it, inasmuch as it, though protestingly, feels itself compelled to submit to the finding that it fraudulently misrepresented its car to be a new one, and thereby induced defendant to purchase it. Plaintiff cannot complain that it is not placed *in statu quo* in respect of the Flanders car, because by its voluntary act it sold that car and received the money for it, and by its own act made it impossible for defendant to restore it to plaintiff. Furthermore, defendant is no more required to restore that car to plaintiff than he is required to pay plaintiff the purchase money, for the Flanders car was delivered and received, like the money, as part consideration for the Sampson car.

It is further contended that defendants did not attempt to rescind within a reasonable time. It was said in *Hammond v. Wallace*, 85 Cal. 531, [20 Am. St. Rep. 239, 24 Pac. 837], that the first requisite in rescission is prompt action; and it was held in *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 355, [33 Pac. 1107], that subdivision 1, section 1691, of the Civil Code, which provides that the party rescinding must do so "promptly upon discovering the facts," etc., is mandatory as to the promptitude required, except as to the cases therein enumerated (i. e., where there is duress, undue influence, or disability and the party is aware of his right to rescind) and others where a sufficient showing is made in excuse of the delay.

The promissory note was dated December 23, 1911, and became due January 22, 1912, and the written notice of rescission was given January 20, 1912. Plaintiff cites *Gamble v. Tripp*, 99 Cal. 223, [33 Pac. 851], in which the defendant pleaded rescission on the ground of fraud. In that case, four

and a half months elapsed after discovery of the fraud, and not until the action was brought upon a long past due promissory note did defendant offer to rescind. Said the court: "This, in the absence of some excuse for the delay, was certainly not the prompt action required by the code, and therefore cannot be availed of." *Bailey v. Fox*, 78 Cal. 389, [20 Pac. 868], cited by plaintiff, was the case of alleged fraud in a contract of partnership where the delay in offering to rescind was four months after discovery of the fraud which was held fatal to the claim. It is contended that defendant was silent after discovering the alleged fraud and continued to treat the property as his own, and is therefore bound by the contract and will not be permitted to rescind. (Citing *Grymes v. Sanders*, 93 U. S. 55, 62, [23 L. Ed. 798].) Furthermore, that, after knowledge of the alleged discovered defects in the car, defendant affirmed the contract by asking an extension of time to pay the note and the privilege of reselling the machine in order to meet the note.

Defendant was at the time engaged in running a garage at the town of Manteca, which is thirteen miles from Stockton and seventeen miles from Modesto. In his business he carried passengers by automobile to near-by towns. In purchasing the car from plaintiff it was understood that he was to have the agency for the sale of the Sampson car. The car was brought by its own power from San Francisco by plaintiff's agent, Hastings, and arrived in the morning about 9 o'clock, Hastings having stayed overnight at Tracy. Defendant testified that passengers were there anxious to catch a train at Stockton, and Hastings drove the car there for defendant, who made no examination of the car at that time. On his return he found "one of the [front] tires was worn through the fibre, the thread was worn out down to the fibre on one wheel and the other was worn flat considerably and the fender on the right hand side of the machine at the back was broken." He wrote to plaintiff and the tire was replaced about a week later. He took off the radiator, which was leaking, "and found that it had been patched." He used the car some time, and drove it on a trip to Modesto, "and one of the front springs came in two and separated." This, he testified, was about three weeks after he got the car. About a week later he drove the car again to Modesto and broke the other spring. He then started to dismantle the car,

and for the first time examined its parts and became satisfied that it was an old car, as other witnesses who examined it testified was the fact. This was two or three days before the note became due. He testified that he used the car carefully and that the roads were in fair condition, and that he had not driven the car more than two hundred miles in all. He testified that, on January 20th, on his return from his second trip to Modesto, he telephoned to plaintiff, and, on January 22d, he wrote plaintiff, in which he informed plaintiff that "the car was second-handed and was second-handed when I bought same from you," and calling upon plaintiff "to send and get the car," and that he "refused to accept the car and pay for it according to contract." On January 6th plaintiff wrote defendant, reminding him of the note, to which defendant replied, January 8th, expressing disappointment in getting money and, in closing, said: "I would rather you would take the car back, if terms satisfactory to both parties can be arranged. I would do my best to sell it for you here." Plaintiff replied, of date January 9th, suggesting part payment, and that the balance could be carried "for a reasonable length of time. We assure you we want to do everything possible to help you out, and sincerely trust that in the near future you will be able to send us several orders for cars." On January 15th defendant wrote plaintiff making a proposition that if plaintiff would accept three hundred dollars cash and a note for ninety days, he would "send same by return mail." He speaks also of having tried to make sales, and one party proposed to exchange real estate as payment. "They like the car fine, but have no cash to put in a car just now." He testified that he meant that the party "liked the appearance of the car." January 16th plaintiff replied, making a counter proposition to accept three hundred dollars and a note for ninety days for balance. No further correspondence appears except defendant's letter of January 22d and a more formal letter of like tenor, of date January 26th, written by defendant's attorney to plaintiff. Defendant testified: "The first time my suspicions were aroused that the car was a second-hand car was when I came home from Modesto, when that spring was broken. That is the spring marked 'Defendants' Exhibit A.' That is a part that fits over the center part of the spring, and covers up the place where the spring is broken. Yes, it is a clip. These bolts

and the clips fasten the spring to the axle. That could not be seen until the spring came apart." Upon a careful examination of parts not theretofore noticed particularly, evidences of wear were discovered indicating, as witnesses testified, previous use of the car to considerable extent.

It might seem strange that defendant had this car in use nearly a month before discovering that it was a used car when delivered. The correspondence is much dwelt upon by counsel as tending to show, and we think the inference a reasonable one, that, as late as January 15th (the car was delivered December 23d), defendant had no thought of rescinding. Indeed, defendant testified that his suspicions were first aroused that the car was not a new one after returning from Modesto on January 20th. This was five days after his letter of the 15th was written. Lapse of time alone is not of itself conclusive of laches. The circumstances under which the car was received and the conduct of the purchaser in using it are of more consequence. Defendant received the car under warranty that it was new. He was about to become the agent for the sale of this type of car, and the evidence shows that he made efforts to carry out the objects of his agency. Dealing with a reputable firm and having no cause for distrusting its members, and being about to engage in business with them, he would naturally and might, we think, justifiably accept their statements at face value. The circumstance that he did not rescind until two days before his note became due, and the fact that presumably he was satisfied with the car as late as January 15th, were matters placed before the court, and, as we must presume, were given full weight in determining the question whether the delay in rescinding the contract was fatal to recovery. All the facts and circumstances being considered, we cannot say that the court reached its conclusion unsupported by sufficient evidence.

Plaintiff cites *Oppenheimer v. Clunie*, 142 Cal. 313, [75 Pac. 899], in support of its claim that defendant affirmed the contract after discovering the defects in the car. It is true he did discover some defects prior to January 15th, but not enough to arouse his suspicion. But it was after this date that other facts came to his notice which led to a careful examination of the car and the discovery that it was not a new one.

It was contended that defendant exercised acts of ownership over the automobile inconsistent with his claim that he was holding it subject to plaintiff's order. It appeared incidentally in the case that the car was under attachment, at whose instance does not appear, and was in the custody of the sheriff at and before the time of the trial. While in the sheriff's custody, and with his consent, but without the consent of plaintiff, defendant took off the wheels and detached some other parts and brought them into court as exhibits at the trial.

Plaintiff cites *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, [36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 28]; *Klock v. Newbury*, 63 Wash. 153, [114 Pac. 1032]; *Noble v. Olympia Brewing Co.*, 64 Wash. 461, [36 L. R. A. (N. S.) 467, 117 Pac. 241]. In the first of these cases a vendee claimed a shipment of soda ash was not suitable for the purpose intended, and so notified the vendor. Thereafter he used six tierces out of sixty-three shipped, and then attempted to rescind the contract of sale and recover the purchase price which he had paid. The judgment in favor of the vendee was reversed on appeal. The supreme court said: "Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need a test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection if they proposed to insist upon their right to reject. They must do no act which they would have no right to do unless they were the owners of the goods. (Benjamin on Sales, 6th ed., sec. 703.) Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant."

The second of the cases cited was rescission of a contract for the sale of an automobile warranted to be a sixty horsepower car. The vendee had expended \$49.90 in an attempt to put the car in order. His action was to recover the purchase price, the amount spent for repairs and fifty dollars damages for time lost in attempting to operate the car. Among other defenses it was urged that in expending \$49.90 in repairs, plaintiff was estopped from claiming the right to rescind. Holding that this contention was untenable, the court stated the rule as follows: "Voluntary acts on the part of the purchaser of a chattel under a warranty of condition which will operate as an estoppel of the right to rescind must be such as affect the seller, and cause a change in his situation with reference to the property, making it inequitable to enforce the remedy."

The third of the cases cited was rescission of a contract for the sale of material for barrels. Defendant notified the seller that the quality was inferior, and requested a reduction, which was refused. Correspondence ensued, the defendant meantime continuing the use of the material "much more than was necessary to ascertain its quality." Referring to the two cases above noted, the court held that "by using an excessive and unnecessary percentage of the goods respondent not only accepted them, but also waived its right to rescind."

It does not appear that the car was injured or its value impaired by temporarily removing some of its parts to be used as evidence at the trial, or that defendant was prevented thereby from delivering the car to plaintiff as the court directed he should, on compliance by plaintiff on its part with the judgment of the court. In the case of the *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, [36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 28], where the court said the plaintiff had no right to use the defendant's property for the purpose of manufacturing evidence against its opponent, the statement must be read in connection with the facts. The glass company used a considerable quantity of the soda ash for its own purposes, much more, as the court found, than necessary to test its quality. The claim that it was done to obtain evidence might well have called for the statement that the company had no right to do this. The decisive fact was that the company had used an excessive quantity and received the benefit of it, and would not be permitted to take cover

under the pretense that it was to obtain evidence. Here the facts were quite different. Defendant made no personal use of the car after his notice of rescission, nor did he exercise any acts of ownership over it. It would have been more orderly to have first obtained the order of the court or consent of plaintiff for what he did, but we cannot see that the rules laid down in the cases cited by plaintiff were so far violated by defendant as to preclude him from asserting his right to rescind.

We discover no prejudicial error in the record, and the judgment and order are, therefore, affirmed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 3, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1916.

---

[Civ. No. 1628. First Appellate District.—March 3, 1916.]

**C. A. JENKINS, Respondent, v. LOCKE-PADDON COMPANY (a Corporation), Appellant.**

**BROKERS—CONTRACT TO SHARE COMMISSIONS—STATUTE OF FRAUDS.—**

The statute requiring contracts employing a broker to sell real estate to be in writing is not applicable to an agreement by one real estate agent to share with another agent the former's profit or advantage as the result of a sale or exchange of the properties of their principals, in the form of a fixed per centum on the valuation of the land taken by the principal of the latter in course of the exchange.

**Id.—CONSTRUCTION OF TERM "COMMISSION."**—The term "commission" should be given a broader meaning than merely that of a per centum valuation on the services of either agent; and, if it is made to appear that the first agent, by virtue of whatever understanding he may have with his principal, is to derive a definite advantage in the way of a material profit from the sale or exchange of his principal's property, and that such agent does derive such advantage from a transaction brought about through the co-operation and services of such second agent, as the result of an oral agreement between them, the statute of frauds is inapplicable, and the former must account to the latter therefor.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a nonsuit. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

J. L. Smith, for Appellant.

Norman A. Eisner, for Respondent.

**RICHARDS, J.**—This is an appeal from a judgment in plaintiff's favor for the sum of \$450 alleged to be due from the defendant as a commission in a transaction involving the exchange of real properties; and from an order denying a motion for a nonsuit.

The complaint alleges in substance that both plaintiff and defendant are real estate agents; that the defendant as such agent had for sale or exchange certain property near Woodland known as the "Hollingsworth tract"; that the plaintiff knew of a man named Gibney who had certain real estate in Stockton which he would exchange for country property, and, with this knowledge, went to the defendant with a view to bringing about such an exchange; and it was then agreed between them that if the plaintiff would arrange for an exchange of the property of said Gibney for lots in the Hollingsworth tract the defendant would share with plaintiff its commission on said exchange, and pay plaintiff ten per cent on the value of the land so taken by Gibney in such exchange; that said exchange was negotiated by the plaintiff and that the same was fully consummated, but that the defendant had failed and refused to pay said commission due thereon.

The answer admitted that the defendant was a corporation, and that the parties were each real estate agents, but otherwise denied all the other averments of the complaint.

Upon the trial of the cause the testimony of the plaintiff and of Mr. Charles L. Paddon, the secretary of the defendant, and one of its officials with whom the plaintiff chiefly dealt in the premises, was sharply in conflict as to most of the matters involved in the agreement and leading up to the exchange; but the jury apparently resolved these conflicts in favor of the plaintiff and rendered its verdict accordingly.

A careful reading of the testimony satisfies us that the following facts may fairly be deduced therefrom: The defendant Locke-Paddon Company was a corporation engaged in the business of selling real estate. There was also another corporation known as the "Small Farms Improvement Company," which was also engaged in handling real estate, having its office in the same rooms with the Locke-Paddon Company. The two companies were so closely interrelated that the president and secretary of the one was also president and secretary of the other, and the stockholders of each were largely, although not wholly, the same; the relation of these two corporations was in fact so intimate that neither charged the other commissions on any sales or exchanges which either might negotiate on behalf of the other, but received the reward or advantage of such co-operation in the profits accruing therefrom to those mutually interested as officers and stockholders of both corporations. According to Mr. Paddon, the president and secretary were the controlling spirits of both corporations, and the Locke-Paddon Company was the managing agent of the Small Farms Improvement Company, which owned the Hollingsworth tract and had placed it with the Locke-Paddon Company for sale or exchange. The plaintiff, having seen an advertisement soliciting exchanges for lots in the Hollingsworth tract, went to the office of the defendant and there met Mr. Charles L. Paddon, its secretary, and informed him that he had two parties with whom he thought he could negotiate an exchange. Mr. Paddon showed him the map of the Hollingsworth tract, and told him that if he could arrange for an exchange with either of his parties there would be ten per cent for him on whatever his customer took in value. The plaintiff testified that his understanding from the first interview, and from a later one in which the matter of his taking his commission in the form of lots was discussed, was that such commission was a part of whatever commission or advantage the defendant would derive from the exchange. After the first interview the plaintiff interested Mr. Gibney in the proposition, and brought him in touch with the defendant, which, through its secretary, Mr. Paddon, undertook to close the deal with Mr. Gibney personally. The plaintiff held a number of later interviews with the defendant, in which for some time he was led to believe that the negotiations with Mr. Gibney had fallen through, but later learned that the



transaction had actually been consummated with Gibney and along the lines of his initial proposition to him. Upon learning this fact the plaintiff went to the secretary of the defendant who, while finally admitting that the exchange had been made, refused to allow or pay the plaintiff's commission. Hence this suit.

The first contention of the appellant is that its motion for nonsuit should have been granted because of an asserted variance between the plaintiff's pleadings and his proof. Appellant, in making this contention, concedes that the complaint alleges an agreement by one real estate agent to share with another real estate agent its profit or advantage as the result of a sale or exchange of the properties of their principals; but the appellant contends that the evidence shows merely an agreement to pay the plaintiff a percentage commission on the transaction; and, in this connection, the appellant also contends that such a contract as it claims the evidence discloses must have been made in writing in order to satisfy the statute of frauds; and that since the only proof tendered by the plaintiff was of an oral agreement the nonsuit should have been granted upon that ground also. These contentions at the last analysis reduce themselves to the single question as to whether the evidence sustains the averments of the plaintiff's complaint, that if he would arrange an exchange of a portion of such properties for certain property of Mr. Gibney it would share with plaintiff its commissions on the consummation of such exchange, which share thereof was fixed at ten per cent on the valuation of the lots taken by Gibney in the course of such exchange.

Upon this aspect of the case we are of the opinion that the evidence is sufficient to sustain the verdict of the jury in plaintiff's favor. Such verdict was evidently predicated upon the following instruction given by the court: "Under the terms of the contract sued upon the plaintiff is entitled to recover a judgment if you find that all of the following are facts; and if any one of these elements is wanting then your verdict should be for the defendant:

"1. That the contract referred to in the complaint was actually made by the defendant and the plaintiff;

"2. That an exchange of the property was actually consummated by the plaintiff in accordance with the terms of that contract;

"3. That the defendant was interested otherwise than as owner in the exchange which was consummated, and was to receive some advantage from the owner of such tract upon the consummation of the exchange, and did receive such advantage, and that the 10% referred to in this action is a part of the advantage so to have been received by the defendant.

"You are further instructed that while a parol agreement by the owner of real property to pay an agent a commission for the sale of real property is not valid because it rests in parol, nevertheless an agreement by one person to share his advantage on a sale of real estate with another person, though not in writing, is valid; and if you find that some advantage was to be derived to this defendant from the exchange, and that the defendant was to share its advantage with plaintiff, and that plaintiff consummated the exchange, and that defendant actually received some advantage from the exchange, the verdict should be for the plaintiff."

In the case of *Gorham v. Heiman*, 90 Cal. 346, [27 Pac. 289], it was held that the provisions of subdivision 6 of section 1624 of the Civil Code were designed to protect owners of real estate against unfounded claims of brokers; that it did not extend to agreements between brokers to co-operate in making sales for a share of the commissions. The rule as thus stated has been approved and applied by this court in the later cases of *Casey v. Richards*, 10 Cal. App. 57, [101 Pac. 36]; *Saunders v. Yoakum*, 12 Cal. App. 543, [107 Pac. 1007]; *Baker v. Thompson*, 14 Cal. App. 175, [111 Pac. 373], and *Johnston v. Porter*, 21 Cal. App. 97, [131 Pac. 69].

In the case of *Aldis v. Schleicher*, 9 Cal. App. 372, [99 Pac. 526], however, it was held that the provisions of subdivision 6 of section 1624 of the Civil Code were applicable to agreements between agents for the sale or exchange of the properties of others when the contract was an unconditional agreement to pay a stipulated sum for the performance of the agreed services of the second agent regardless of whether the first agent had a valid contract for the sale of the property by the terms of which he was to receive a commission. The case of *Saunders v. Yoakum*, 12 Cal. App. 543, [107 Pac. 1007], followed the doctrine thus stated in the *Aldis* case. In the case of *Johnston v. Porter*, 21 Cal. App. 97, [131 Pac. 69], this court distinguished the cases of *Aldis v. Schleicher*, 9 Cal. App. 372 [99 Pac. 526], and *Saunders v. Yoakum*,

12 Cal. App. 543, [107 Pac. 1007], from the case then at bar, to the extent of holding that when it appeared that at the time the action was begun there had actually been received by the first agent a fund in the nature of a commission in which the plaintiff could be awarded a share, it was immaterial what sort of a contract, valid or otherwise, the first agent had with his principal, the owner of the property.

In the endeavor to harmonize these cases, and apply their principles to agreements between real estate agents affecting the sale or exchange of the properties of their respective clients, and particularly to the facts of the case before us, it would seem that the term "commission" should be given a broader meaning than merely that of a percentum valuation on the services of either agent; and that if it is made to appear that the first agent, by virtue of whatever understanding he may have with his principal, is to derive a definite advantage in the way of a material profit from the sale or exchange of his principal's property, and that such agent does derive such advantage from a transaction brought about through the co-operation and services of the second agent, as the result of an oral agreement between them, the former must account to the latter therefor; and a case is thus presented to which the above-named provision of the statute of frauds has no application. Such is the case at bar. The above-quoted instruction of the court was evidently framed upon this theory, and we think it correctly phrased and stated the law applicable to this class of cases. We are also of the opinion that the jury was warranted in finding from the facts before it, and particularly from the evasions of the secretary of the defendant touching the real relation between the two corporations in question, that the plaintiff was entitled to recover the amount of his claim.

From this view of the case it follows that the instruction above quoted was properly given, and that the instructions asked by the defendant were properly refused.

This disposes of the appellant's several contentions.

The judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Div. No. 1644. Second Appellate District.—March 3, 1916.]

**L. B. COOLEY, Respondent, v. BRUNSWIG DRUG COMPANY (a Corporation), Appellant.**

**FINDINGS—UNCERTAINTY—CONSTRUCTION—SUPPORT OF JUDGMENT.**—The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court.

**ID.—NEGLIGENCE—OMISSION TO FIND IN EXPRESS TERMS—SUFFICIENCY OF.**—In an action to recover damages for personal injuries based on negligence, the omission to find in express terms that the defendant was negligent will not defeat the judgment, if the facts found show an omission of duty with a resultant injury.

**ID.—FINDING OF JURY—WHEN CONCLUSIVE.**—Negligence is a relative term depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in each particular case, and when they do so find upon facts as to which reasonable minds might differ in the conclusion reached, their decision is not subject to review on appeal.

**ID.—INJURIES TO DRUG CLERK—JUDGMENT SUPPORTED BY FINDINGS.**—In an action for damages for personal injuries sustained by a receiving clerk of a wholesale drug company from coming violently in contact with a closed fire-door while rapidly ascending a stairway in the building of the defendant, it cannot be said, as a matter of law, that the findings do not support the judgment in favor of the plaintiff, on the theory that the plaintiff was himself negligent in failing to look up and see whether the door was open or closed, where it is shown by the evidence that he, in the discharge of the duties of his employment, used such stairway many times a day, and that he had been doing so for a period of several years, and that the door had never before, to his knowledge, been closed during business hours.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Flint, Gray & Barker, and Henry S. Van Dyke, for Appellant.

Anderson & Anderson, and Trent G. Anderson, for Respondent.

SHAW, J.—Action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence. Judgment in the sum of one thousand dollars went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

The sole ground upon which appellant insists upon a reversal is that the findings do not support the judgment, in that the court not only failed to find, either directly or indirectly, that defendant was guilty of negligence, but the findings affirmatively show that the injury complained of was due solely to the gross negligence of plaintiff.

Upon the question of negligence the court found:

“II.

“That on the 6th day of November, 1911, the plaintiff was, and for about five years theretofore had been, employed in the capacity of receiving clerk by the defendant.

“III.

“That the defendant on the 6th day of November, 1911, and for more than five years previous thereto had been, carrying on a part of its business of wholesale drug dealer in a concrete building in the city of Los Angeles, county of Los Angeles, state of California, situate on New High street, in said city; that among various other sets of stairways and elevators the several floors upon said building were connected by a set of concrete stairways, and that as a protection against fire there was placed over the opening of the stairway leading from the first to the second story a fire door sheathed with iron; that said door was ordinarily kept open, except on infrequent occasions when necessary to close the same on account of prevention of fire or for other special purposes; that said doorway had not been closed during the employment of plaintiff by said company to plaintiff's knowledge during business hours, but that it had been closed on such infrequent occasions or for such special purposes, and when so closed no warning of its having been closed had been given.

“IV.

“That the duty of plaintiff as receiving clerk in the employment of said defendant required him, many times a day, to ascend and descend to the floor above, and that upon the 6th day of November, 1911, while plaintiff was engaged in his

duties as receiving clerk of the said defendant below the second floor of said building the defendant's agents and officers, acting within the scope of their employment, closed said fire door within an hour or two before 2 o'clock p. m. of said day, and did not give any warning to plaintiff that said door had been so closed, and that plaintiff had no notice or knowledge that said door had been closed; but said door was clearly visible from the bottom of said stairway to any one looking up; that on said date, and about the hour of 2 o'clock p. m., plaintiff, while in the discharge of his said duties, was required in the discharge thereof to ascend to the second floor of said building, and assuming that said fire door was open, and without looking up or towards said doorway, and without knowledge that the same was shut, plaintiff ascended the stairway leading to said second floor, and in so doing, came suddenly and violently in contact with the said fire door, and struck the top of his head against same with great violence, and thereby was stunned and thrown backward into a sitting position on the stairway and against the iron railing of the stairway.

#### "VIII.

"That it is true that the said stairway or staircase referred to in plaintiff's complaint leading from the first to the second floors, and in ascending which the plaintiff was injured, is composed of 24 steps; that the width of said staircase is 4 feet, and that the size of the said fire door when closed, exposed to view of one approaching from the first floor and attempting to ascend the said staircase, is 4 feet in width by 11½ feet in length; that all of the surface of said fire door, 4 feet in breadth and 11½ feet in length, is in full view from the first floor, and by any person approaching the foot of such staircase, or any one attempting to ascend the said staircase from the first to the second floor if such person looks up; that the various floors in said building, in the rear part of said building in which plaintiff was stationed ordinarily, have three series or sets of communication with each other, each and all being practically equidistant from the place of plaintiff's ordinary position of employment, to-wit: said set of stairways ordinarily referred to, a freight elevator which was frequently used by plaintiff, and another complete set of stairways; that to pass from the top of the stairway which was

used by plaintiff on the occasion referred to, to the front of the second floor, plaintiff would have to walk past said freight elevator as well as by the head of the stairway which he did not use; that it is not true that the plaintiff on November 6th, 1911, at the time of the collision referred to in plaintiff's complaint ascended said staircase without observing ordinary care, or any care at all, but, on the contrary, the plaintiff at said time and place did, in ascending said staircase, observe ordinary care in so doing, notwithstanding the specific facts hereinbefore found; and it is not true that any injury received by plaintiff was due solely, or at all, to the wanton and reckless manner of the said plaintiff in ascending said staircase, or to the failure of said plaintiff to exercise ordinary care in the premises, or that the plaintiff did ascend said staircase in a wanton or reckless manner."

It is an established rule of law that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. (*Warren v. Hopkins*, 110 Cal. 506, 512, [42 Pac. 986]; *Gould v. Eaton*, 111 Cal. 639, 645, [52 Am. St. Rep. 201, 44 Pac. 319]; *Breeze v. Brooks*, 97 Cal. 72, [22 L. R. A. 256, 31 Pac. 742].) Nor is it necessary, in order to sustain the judgment, that the court should in express terms have found that defendant was guilty of negligence. The omission to allege negligence in a complaint does not render the pleading defective, provided the circumstances alleged are such as to justify the inference of negligence. (*Geneva v. Burnett*, 65 Neb. 464, [101 Am. St. Rep. 628, 58 L. R. A. 287, 91 N. W. 275]; *Silveira v. Iverson*, 125 Cal. 266, [57 Pac. 996]; *Quinn v. Electric Laundry Co.*, 155 Cal. 500, [17 Ann. Cas. 1100, 101 Pac. 794].) So in findings of fact, the omission to find in express terms that defendant was negligent will not defeat the judgment, if the facts found show an omission of duty with a resultant injury.

The question therefore presented is whether or not the facts found, together with inferences deducible therefrom, and which the trial court was justified in making, support the judgment. Judge Cooley, in his work on Torts, defines negligence as "the failure to observe, for the protection of the interest of another person, that degree of care, protection and

vigilance which the circumstances justly demand, whereby such other person suffers injury." It is a relative term, depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in each particular case. "It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff." (*Schierhold v. North Beach & M. R. R. Co.*, 40 Cal. 447; *Bowers v. Union Pac. R. R. Co.*, 4 Utah, 215, 224, [7 Pac. 251]; *Jamison v. San Jose & S. C. R. R. Co.*, 55 Cal. 593; *Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 63, 70, [24 Pac. 723].) And when they do so find upon facts as to which reasonable minds might differ in the conclusion reached, their decision is not subject to review on appeal. So if negligence on the part of the defendant may be reasonably implied from the facts found by the court, it is the duty of this court to construe the findings as upholding the judgment.

Appellant insists that in the case at bar there can be but one inference drawn from the plaintiff's actions as found by the court, and that is one of gross negligence on his part. We cannot assent to this contention. In effect, the court found that defendant was guilty of negligence in closing the trap-door without doing anything to indicate or give notice of such changed condition, thus rendering it dangerous for plaintiff to ascend the stairway as he was accustomed to do. In other words, it failed to do what a reasonably prudent man, having due regard for the safety of his employee, would have done under the circumstances shown to exist. And likewise as to plaintiff. As a reasonably prudent man, accustomed as he was in the course of his employment, covering a period of five years, to run up and down this stairway five to twenty times a day, and never knowing of the door being closed, he was justified, in the absence of notice or warning of its being closed, in assuming that it was open as he had always found it, and hence he was not negligent when, in ascending the stairway, he failed to look up for the purpose of discovering whether or not it was open. The determination of both questions was for the trial court sitting as a jury, and as to both it has made findings of fact from which inferences of negligence on the part of defendant and exonerating plaintiff therefrom may fairly be implied. As a

matter of law, we cannot say the facts as found do not support the judgment, and it, and the order denying defendant's motion for a new trial, are, therefore, affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1916.

---

[Civ. No. 1781. Second Appellate District.—March 3, 1916.]

EARL B. KING, Appellant, v. W. R. JOHNSON et al.,  
Respondents.

**SALE OF REAL PROPERTY—FAILURE TO COMPLY WITH ACT OF MARCH 15, 1907—REFERENCE TO UNRECORDED MAP.**—Under the act of March 15, 1907 (Stats. 1907, p. 290), and amendments thereto, not only is the selling or offering for sale of lots of land in contravention of the provisions of this statute, by reference to an unrecorded map or plat, expressly prohibited, but the act makes it a misdemeanor so to do.

**ID.—SALE BY AGENT—ILLEGAL TRANSACTION—ACTION FOR COMPENSATION.**—An agent, for the sale of land subdivided into lots, who offers the lots for sale with the full knowledge that the provisions of the act of March 15, 1907 (Stats. 1907, p. 290), requiring the filing of a map or plat of the subdivision, have not been complied with, cannot maintain a suit for his compensation, as the consideration for the contract is an illegal act.

**ID.—CONTRACT—ILLEGAL CONSIDERATION.**—A contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy.

**ID.—ILLEGAL TRANSACTION—EVIDENCE.**—Where the complaint in an action discloses the illegal transaction upon which plaintiff founds his right to recover, no evidence is admissible in support of the alleged cause of action.

**ID.—PURPOSE OF STATUTE—RIGHTS OF INDIVIDUALS.**—The statute of March 15, 1907 (Stats. 1907, p. 290), was enacted, not as a revenue measure, but as a declaration of the public policy of the state.

Being in the interest of the public, in applying it, matters of private justice between individuals cannot be considered.

**ID.—ACTION BY BROKER—RIGHTS OF VENDEES.**—The contention that the act of March 15, 1907 (Stats. 1907, p. 290), is intended for the benefit of vendees only, and should not be construed as affecting the right of a broker to recover for services rendered in selling lots in a subdivision by reference to an unrecorded map thereof, cannot be maintained.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Curtis C. Legerton, Judge.

The facts are stated in the opinion of the court.

Gilbert F. Wyvell, for Appellant.

Phil M. Chandler, for Respondents.

**SHAW, J.**—Action to recover commissions for the sale of real estate.

As disclosed by the record, it is difficult to understand the procedure adopted by the trial court in disposing of the case. It seems to be conceded by counsel, however, that its effect was to sustain, without leave to amend, a general demurrer to the complaint, which ruling was followed by a judgment for defendants, from which, and an order denying his motion for a new trial, plaintiff appeals.

While the complaint is most awkwardly drawn, it fairly appears therefrom that the defendants were the owners of a tract of land situated in lot 2, block 21, in the town of Lancaster; that on October 25, 1913, plaintiff and defendants agreed there should be made a subdivision of the parcel of land into forty-six lots, which subdivision they designated "The Umbrella Tract." No map or plat thereof was filed, nor any attempt ever made to comply with the provisions of the act of March 15, 1907 (Stats. 1907, p. 290), and amendments thereto; nor did defendants ever agree to file a map or plat thereof. At the same time, defendants made a written contract with plaintiff, whereby they constituted him their exclusive agent for a period of one year to sell said lots so described as being in the Umbrella tract, as per schedule of prices agreed upon. Thereupon plaintiff, with full knowl-

edge of the fact that no attempt had been made to comply with the provisions of the statute, nevertheless proceeded to offer for sale, and, as alleged, did sell fourteen of said lots by reference to a purported but unrecorded map, to responsible persons who were at all times ready, willing, and able to comply with the terms and conditions of purchase which were agreed upon between them and defendants, which sales were made "subject to the recording by defendants of an accurate map or plat of said tract, with the county recorder of Los Angeles county, wherein said tract is situated"; that defendants neglected to record any map or plat of said tract, by reason of which fact the sales so made by plaintiff were never consummated.

Section 8 of the act referred to provides that "no person shall sell or offer for sale any lot or parcel of land, by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged and filed in all respects as provided in this act, . . . " And section 9 provides that "every person who violates any of the provisions of this act is guilty of a misdemeanor," the penalty for which is fixed at both a fine and imprisonment. It thus appears that not only is the selling *or offering for sale* of lots in contravention of the provisions of the statute expressly prohibited, but section 9 attaches a penalty to every violation thereof. It would seem clear that, in the absence of a compliance with the statute, it was a violation of law for defendants to even *offer* the lots for sale; and, if this be true, it was likewise a violation of law for plaintiff, as their agent, to offer them for sale, thus joining with his principals in a known illegal act for the doing of which he asks compensation. He is then seeking to recover for services the performance of which was prohibited by law; hence the sole consideration for the contract upon which he bases his claim was the doing of known illegal acts. In *Swanger v. Mayberry*, 59 Cal. 91, it is said: "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy." The complaint discloses the illegal transaction upon which plaintiff founds his right to recover, and

this being true, no evidence was admissible in support of the alleged cause of action. The statute was enacted, not as a revenue measure, but as a declaration of the public policy of the state. Being in the interest of the public, we cannot, in applying it, consider matters of private justice between individuals; for "the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an . . . illegal act." (*Berka v. Woodward*, 125 Cal. 119, [73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777], and cases there cited.)

Appellant insists that the statute is intended for the benefit of vendees only, and should not be construed as affecting the right of a broker to recover for services rendered in selling lots in a subdivision by reference to an unrecorded map thereof. It is unnecessary to determine the right of a vendee, since such right is not involved. Cases cited from other jurisdictions are based upon statutes which the courts, for different reasons, construed as not prohibiting the sale, while the statute under consideration, in express terms, prohibits the doing of the act for which it is sought to recover. No purpose could be subserved in reviewing such cases here.

The judgment and order are affirmed.

Conrey, P. J., and James J., concurred.

---

[Civ. No. 1725. First Appellate District.—March 4, 1916.]

**F. W. SWANTON, Respondent, v. ROMIE C. JACKS,  
Appellant.**

**PARTNERSHIP—INTRUSTING MONEY TO PARTNER—DUTY TO ACCOUNT.—**

A partner who is intrusted with money by his copartner to carry out the purposes of the partnership, acts as the trustee of his associate, and, as such, he is bound not only to an exercise of the highest degree of diligence and good faith in the administration of his trust, but he is also bound to keep and render a full and exact account of his transactions, and of all moneys received and their proper investment.

**ID.—ACTION FOR DISSOLUTION—DEFAULT OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this action for the dissolution of a partnership, an accounting, and for the recovery of certain moneys intrusted to the defendant by the plaintiff for partnership purposes, it is held that the finding that the defendant had willfully failed and neglected to attend to the business of the partnership, or to carry into effect the purposes for which it was formed, is sustained by the evidence.

**ID.—ACCOUNTING—WHEN UNNECESSARY.**—Where a partnership involves but one transaction, and an accounting of the items thereof is had during the course of the trial, and finding made as to the balance due, it is unnecessary to find the items of the account, or to order an accounting to be had.

**ID.—CONVERSION OF FUNDS—EVIDENCE—AMOUNT OF JUDGMENT.**—Where it is found that the defendant converted to his own use the money of the firm which the plaintiff himself had contributed thereto, it is proper to give the plaintiff judgment for the full amount, and not for one-half of such sum.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

N. A. Dorn, and C. D. Dorn, for Appellant.

C. H. Sooy, Walter Shelton, and David L. Levy, for Respondent.

**RICHARDS, J.**—This is an action brought for the dissolution of a partnership, and for an accounting between the parties to it, and for the recovery by the plaintiff of such sum as should be found due him thereon. The complaint sets up in full the articles of copartnership, from which it appears, in substance, that the parties were to engage in the business of giving aeroplane exhibitions in various parts of the country, and that as a preliminary thereto the defendant was to proceed to France, taking with him a man who was to be instructed there in the art of aviation; that the defendant was, while there, to inspect and purchase one or two aeroplanes for use in said exhibitions; that in order to meet the expenses of the trip each of the parties was to put up the sum of five hundred dollars, and which the defendant was to receive at

the time of his departure for France; that each of the parties was to contribute the additional sum of four thousand five hundred dollars, which was to be placed in the hands of a trustee named in the agreement as soon as the defendant should have selected for purchase said machines; that thereupon the said trustee was to forward to said defendant such sum up to eight thousand dollars as would cover the purchase price of said machines; that the balance of the fund in the hands of the trustee was to be dispensed in arranging for and advertising the exhibitions.

The complaint then proceeds to aver "that from the commencement of said partnership said defendant has willfully neglected the business of said partnership, and to carry out the purposes for which it was formed, and has from time to time applied to and converted unto his own use and benefit from moneys belonging to said partnership and constituting the capital thereof, large sums of money, to the detriment of said partnership and the injury of said plaintiff."

In the answer of the defendant the making of the partnership agreement is admitted, but the above-quoted averment of the complaint is denied, and the defendant further affirmatively sets forth the several acts and expenditures on his part in furtherance of the objects and execution of said agreement.

Upon the trial of the cause the court found the agreement to have been made, and that under its terms the plaintiff had intrusted to the defendant the sum of three thousand three hundred dollars. It then found, in the terms of the above-quoted allegation of the complaint, that the defendant had willfully neglected the business of said partnership, and willfully neglected to carry out the purposes for which it was formed, and had converted to his own use and benefit two thousand eight hundred dollars of the said moneys so intrusted to him by plaintiff; and the court further found that upon an accounting between the parties there was due, owing, and unpaid to the plaintiff from the defendant the sum of two thousand eight hundred dollars. The court then entered judgment for a dissolution of the partnership and for the recovery by plaintiff of the said sum.

The defendant appeals from the judgment, and from an order denying a new trial.

The first contention which the appellant urges upon this appeal is that the evidence is insufficient to sustain the find-

ing of the court to the effect that the defendant either neglected the business, or failed to carry out the purposes of the partnership, or that he converted any of its money to his own use. In support of this contention the appellant calls the attention of the court to his own testimony relative to his trip to France, and to the purchase of an aeroplane, or aeroplanes, there. If the trial court believed the testimony of the defendant in regard to these matters it would follow necessarily that the findings were contrary to such evidence. But it must be remembered that the defendant was acting throughout as the trustee of his associate in said firm, and that, as such, he was bound, not only to an exercise of the highest degree of diligence and good faith in the administration of his trust, but that he was also bound to keep and render a full and exact account of his transactions, and of all moneys transmitted to him and of their proper investment, in accordance with the terms of his agreement, and that his testimony in regard to all such matters should be clear and explicit (*Foster v. Davis*, 46 Mo. 268; *Baker v. Williamson*, 4 Pa. St. 456).

Without undertaking to review the evidence in detail, it may be stated that a mere cursory inspection of the record will show that the testimony of the defendant falls far short of measuring up to these requirements, and that it was of such a doubtful, vacillating, and altogether unsatisfactory character as to have amply justified the court in rejecting the whole thereof, and in finding, in the language of the plaintiff's complaint, that the defendant had willfully failed and neglected to attend to the business of the partnership, or to carry into effect the purposes for which it was formed. (*Bone v. Hayes*, 154 Cal. 759, [99 Pac. 172]; *Roberts v. Roberts*, 168 Cal. 307, [Ann. Cas. 1916A, 886, 142 Pac. 1080]; *Treat v. Treat*, 170 Cal. 329, [150 Pac. 53]; *Guerrero v. Ballerino*, 48 Cal. 118.)

The appellant's next contention is that the court has failed to find upon the issues raised by the affirmative statements of his answer relative to his trip to France and his doings there.

It is true that the court has not specifically referred to these matters in its findings; but, as is above shown, the court has made a general finding which, if true, carries with it the necessary implication that the affirmative asseverations of the defendant in his answer and his evidence are untrue. This being so, no detailed finding was required to respond to the

issues raised by the defendant's answer, for the added reason, if for none other, that the answer of the defendant raised no new issue in the case, but only amounted to the affirmative averment of matter already put in issue by his denials of the allegations of the complaint as to his neglect of the business and conversion of the funds of the firm.

The appellant further urges that the findings and judgment of the court are insufficient, for the reason that this being an action for the dissolution of the firm, and for an accounting, the court should in its findings have found and given the items of such account, or else in its judgment have ordered that such accounting be thereafter had.

It is to be noted, however, that this partnership had during its brief period but one transaction, involving the deposit with a trustee of a certain fund, and its outlay for but two objects, viz., the trip of the defendant to France, and the purchase by him of an aeroplane or two while there. The evidence shows that an accounting was had as to both these items during the trial, and the court finds that upon such accounting there is a balance in plaintiff's favor of two thousand eight hundred dollars. It cannot therefore be justly said that the court has not made an accounting and found and fixed the balance due the plaintiff thereon.

As to this finding, however, the appellant urges that since the court found that the defendant had only diverted two thousand eight hundred dollars of the money of the firm, the defendant could only be held liable to the plaintiff for half of that sum, and hence that the amount of the judgment is double what it should have been.

This argument is, however, based upon a misconception of the finding of the trial court; for the finding is that the money of the firm which the defendant converted to his own use was that portion thereof which the plaintiff himself had paid, and which had been intrusted by him to the defendant. Thus construed, the findings and judgment properly provide for the repayment to the plaintiff of the sum which he had paid into the firm.

The appellant's further contention is that the court erred in permitting a certain witness to testify to a conversation held with the trustee of the parties, but in the absence of the defendant. An examination of the record in this regard shows that the error, if any, was harmless, for the reason that

the testimony educed was unimportant, and related to matters already in evidence from the lips of other witnesses.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1916.

---

[Civ. No. 1709. Second Appellate District.—March 4, 1916.]

**GARA WILLIAMS, Respondent, v. PHEBE A. PARKER  
et al., Appellants.**

**PROMISSORY NOTE—PLEDGE OF CORPORATE STOCK—SALE—WAIVER OF NOTICE.**—Where a promissory note recites the fact of deposit with the payee of corporate stock as security for the payment of the obligation, and that the latter has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call, the obligation shall immediately become due and payable, or the payee, or its assignee, may sell or collect the securities at public or private sale at any time without demand, judgment, or notice, they being expressly waived, a sale at public auction of the security in accordance with the code without notice, is valid; and the contention that the waiver was limited to the condition which might arise on failure of the pledgor to furnish additional security called for, cannot be maintained.

**ID.—PLEDGE WITH POWER OF SALE—RIGHT OF PLEDGEE.**—While it is true that the relation existing between parties to a transaction where collateral is placed in the hands of the pledgee as security for the payment of a debt, with power of sale in case of default, is in the nature of a trust relation, and that the power must be exercised in good faith, yet, where the pledgee makes the sale in the manner provided by law, and in accordance with the conditions of the contract, and it is not shown that he did, or caused to be done, anything for the purpose of preventing a fair sale, the pledgor has no right to complain.

**ID.—NOTE FOR STOCK—AGREEMENT NOT TO SUE—LACK OF ESTOPPEL.**—In an action to recover on a promissory note transferred by the corporation payee to another corporation as part payment of cor-

porate stock, the transferee is not estopped from bringing the action by reason of a proposed agreement to dissolve the two corporations, and not to enforce collection of the note which was originally given for stock in the former corporation.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Henry W. Nisbet, and Harriman, Ryckman & Tuttle, for Appellants.

Slosson & Mitchell, for Respondent.

**CONREY, P. J.**—The defendants appeal from the judgment, and from an order denying their motion for a new trial.

On July 1, 1908, defendant Parker executed in favor of the Merchants and Insurers Reporting Company, a corporation, a so-called promissory note for the principal sum of one thousand dollars, bearing interest, and payable on or before five years after date. The note recited the fact of deposit with the payee of one hundred shares of stock in said corporation as security for the payment of the obligation. It was further provided therein "that the Merchants and Insurers Reporting Company has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call, the obligation shall immediately thereon become due and payable; or on the non-performance of this promise, the said payee, its president, or secretary, or assigns, is and are hereby given full power and authority to sell, assign, and deliver, or collect the whole or any part of the above-named securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice, such demand, advertisement or notice being hereby expressly waived." The defendant Youtz guaranteed the payment of said note by the following indorsement thereon: "Each of the undersigned hereby guarantee payment of the within note, waiving demand, presentment for payment, protest and notice of protest. J. E. Youtz." This note was assigned by the payee to the Bankers Fire Insurance Company,

a corporation, and was thereafter assigned by that corporation to the plaintiff. The assignment to plaintiff was not for a valuable consideration, and was merely for the purpose of collection. After the note became due, and on the fifteenth day of October, 1913, the pledged shares of stock were by the plaintiff sold at public auction, after notice by publication as required by section 3005 of the Civil Code, and without actual notice to the defendants. At that sale the shares of stock were purchased by an attorney of the plaintiff as trustee for the Bankers Fire Insurance Company, paying therefor the sum of one dollar, which was less than the expenses of the sale, and resulted in no payment of any part of the principal or interest due on the note. Immediately after the completion of said sale, notice thereof was served upon each of the defendants, with demand for payment of said sum of one thousand dollars, with the accrued interest thereon, less forty-five dollars interest paid on April 1, 1909. The note was not paid, and this action was commenced on the following day.

The answer pleads full payment of the note, and also alleges that the sale of pledged stock was not in good faith, but was made with the intent, on the part of plaintiff and the Bankers Fire Insurance Company and the purchaser, of defrauding defendants, and depriving them of the stock and the value thereof, which value they alleged was two thousand dollars in the open market. No evidence was produced by the defendants on the subject of the value of the pledged stock, and the court's finding that the sale was made in good faith and for the true value thereof, is sufficiently shown by the evidence proving the manner in which the sale was made. The claim of appellants that the sale was illegal for want of actual notice to the pledgor, is met by the waiver of such notice, which we have quoted from the note. We do not agree with them that the waiver as stated was limited to the condition which might arise upon failure of the pledgor to furnish additional security if called for. Notice having been waived, the sale at public auction in accordance with the code requirements was a valid sale. It is true that the relation existing between parties to a transaction where collateral is placed in the hands of the pledgee as security for the payment of a debt, with power of sale in case of default, is in the nature of a trust relation, and that the power must be exercised in

good faith. But where the pledgee makes the sale in the manner provided by law, and in accordance with the conditions of the contract, and it is not shown that he did, or caused to be done, anything for the purpose of preventing a fair sale, the pledgor has no right to complain. Under such circumstances the pledgee may take the market as he finds it and exercise his power of sale accordingly. (*Hudgens v. Chamberlain*, 161 Cal. 710, 715, 716, [120 Pac. 422].)

The Bankers Fire Insurance Company was organized under the laws of the state of Arizona. All of its stock, except three or four shares, was purchased by the Merchants and Insurers Reporting Company for the sum of two hundred thousand dollars, of which five thousand dollars was paid in cash and one hundred and ninety-five thousand dollars was paid by transferring to the Bankers Fire Insurance Company notes in that aggregate amount which had been executed to the Merchants and Insurers Reporting Company in consideration of purchases of its stock; the note in suit being included among them. On the twelfth day of July, 1913, a few days after this note became due, there was held an adjourned session of an annual meeting of stockholders of the Merchants and Insurers Reporting Company. There were present at that meeting two of the three directors of the Bankers Fire Insurance Company, and there was some discussion relating to both corporations, in the course of which the two directors of the Arizona corporation and a stockholder of the Merchants and Insurers Reporting Company, who, at that time, was about to be elected as a director of the last-named corporation, expressed views favorable to the making of some arrangement by which both corporations would be dissolved. One of the directors elected at that time stated that if so elected he would pledge himself to bring about the dissolution of these two corporations, and not undertake to enforce the collection of the notes maturing on July 1, 1913. This fact is stated in the testimony of defendant Parker and is not contradicted. Neither is her statement, "that the other directors elected at that time practically agreed to the same thing," contradicted by anything in the record. Defendant Parker testified that from those statements, and what occurred at that meeting, she believed that no attempt or effort would be made to collect her note, and that she therefore took no steps to protect herself on the note or her stock pledged as security therefor;

that she had no knowledge that payment of her note was desired by the holder until after her stock was sold, and had no knowledge that it was to be sold.

Upon the foregoing facts it is urged that the defendants have established an equitable estoppel which should be sufficient to prevent any recovery on the note in this action. For various reasons there is no merit in this defense. As we have shown, the value of the shares of stock, so far as proved herein, was trivial. The owner of the note had the legal right to sue on it, even without any attempt to realize on the security. If the board of directors of the Bankers Fire Insurance Company had formally resolved that it would not bring suit on this note, that would not have been a defense to the action, since there was no consideration passing to it for its forbearance. (*Peachy v. Witter*, 131 Cal. 316, [63 Pac. 468].) Much less can the right of action be denied merely because stockholders and proposed directors in the Merchants and Insurers Reporting Company, and directors of the Bankers Fire Insurance Company, speaking individually for themselves, favored corporate action to be taken by the former corporation for the purpose of controlling the action of the Bankers Fire Insurance Company in the matter of collection of notes owned by the latter company. There is no evidence that the defendants were able, ready, or willing to pay this note under any circumstances, or at all. Even if it should be conceded that under the circumstances the sale was wrongful, the damage accruing would be as for a conversion, which should have been pleaded by way of counterclaim, and such right of counterclaim would have existed in favor of defendant Parker alone, the defendant, Youtz, being not concerned therein. Facts constituting the basis for a counterclaim must be pleaded as a counterclaim, or the counterclaim will not be available to the defendant. (*Cohn v. Kelly*, 132 Cal. 468, [64 Pac. 709]; Ann. Cas. 1913A, 1079, note.)

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1607. Second Appellate District.—March 6, 1916.]

**JOHN A. GORDON, Respondent, v. WILLIAM B. ROBERTS et al., Copartners, etc., Defendants; JAMES B. LANKERSHIM et al., Appellants.**

**NEGLIGENCE—INJURY TO PERSON ON SIDEWALK—FALL OF PAINTER'S TRESTLE—LIABILITY OF OWNER OF BUILDING.**—The owner of a building in course of construction is liable in damages for injuries received by a person standing on the sidewalk in front of, and several feet distant from, the line of the building from the falling upon him of a painter's trestle while the trestle was being moved by several men who were delegated for that purpose by the contractor doing the general work of the building, where, under the terms of the contract between the painter and the owner, the latter was not only to provide the trestles, but to take care of the moving thereof, and it is not shown that the persons who moved the trestle were, as to such owner, independent contractors.

**ID.—EVIDENCE—FALLING OF TRESTLE—PRIMA FACIE CASE OF NEGLIGENCE.**—In an action to recover damages for such injuries it is not necessary that the particular act, thing, or motion which caused the trestle to fall should be illustrated by direct evidence, as the mere fact of the falling of the trestle upon the plaintiff makes a *prima facie* case of negligence on the part of the person or persons responsible for the falling thereof.

**ID.—EVIDENCE—MUNICIPAL ORDINANCE—BARRICADE OVER SIDEWALK.**—In such an action it is not error to admit in evidence an ordinance of the municipality which required that a barricade be erected with a canopy over the sidewalk where building work was in progress.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Wm. D. Dehy, Judge presiding.

The facts are stated in the opinion of the court.

Morton, Hollzer & Morton, Frank P. Deering, and Pacht & Lipps, for Appellants.

Kemper B. Campbell, Frank P. Doherty, Charles S. Burnell, and Wheeler & Sweet, for Respondent.

**JAMES, J.**—Judgment was entered herein in favor of the plaintiff and against the defendants in the sum of \$1,237 as damages which the jury fixed as the amount of compensation

awarded to the plaintiff for personal injuries suffered by reason of the alleged negligence of the defendants. There was a motion for a new trial made on behalf of the defendants Lankershim and Biorci, which motion was denied. This appeal was then taken by said defendants from the judgment as entered, and from the order denying them a new trial.

The record of the trial is presented by bill of exceptions. The facts as they appear to have been established by competent evidence introduced on behalf of the plaintiff, are as follows: At the date when the alleged injuries were suffered by the plaintiff, a business building was being erected at the corner of Main and Fourth Streets, in the city of Los Angeles, for the appellant Lankershim. The building had been in the main completed. Appellant Biorci was employed by Lankershim, or his authorized agent, to decorate the corridor on the ground floor which was entered from the Main Street side. The sidewalk was already laid in front of the building. Plaintiff, on the day in question, was standing on the sidewalk several feet distant from the line of the building, waiting to take a trolley car to Pasadena. A painter in the employ of Biorci was at work on a tall trestle near the entrance by which the plaintiff was standing. It became necessary to move the trestle, and several men, who were delegated for that purpose by a contractor doing the general work of the building, came to do the work. While engaged in this operation the trestle was tipped toward the street and either the end of it, or a plank therefrom, fell and struck the plaintiff on the shoulder, throwing him to the sidewalk and inflicting the injuries on account of which he afterward sued. Biorci at that time was working at a point in the corridor about one hundred feet from the trestle toward the interior of the building. The one man who had been at work upon the trestle remained there during the operation of moving and was himself thrown down. It was agreed in the contract made by Biorci with the owner of the building that the scaffolding and the moving thereof should be attended to by the owner; or, in other words, that the owner should furnish men from the staff of the contractor to move it. The defendants all claimed that there was an absence of negligence on their part, and it was further claimed by the appellant Lankershim in defense that the negligence, if any, which was committed producing injury to the plaintiff, was the negligence of persons who were, with respect

to their relation to the owner of the building, independent contractors. No evidence appears from which it can be determined as to what the conditions of the contract were respecting the erection of the building by the Roberts Construction Company. It may have been, and there was an entire absence of proof to the contrary, that the general contractor was under the direction of the owner as to the manner and means by and with which the work should be prosecuted. In such a case the contractor, of course, would occupy the ordinary relation of a servant toward the owner. As we view the testimony, there was no evidence at all before the jury which would warrant any finding excusing appellant Lankershim from liability on the ground that the persons whose negligence caused plaintiff's injuries, were, as to him, independent contractors. Lankershim's agreement with Biorci, undisputably shown in evidence, was that he would provide not only the trestles themselves, but would take care of the shifting of the trestles as they were required to be moved in order to enable Biorci to perform his contract. We can find no evidence which justifies the verdict of the jury as against Biorci. It matters not at all whether he was an independent contractor as to the doing of the painting or decorating; no negligent act of his was committed while in the performance of that work which resulted in any damage to the plaintiff. The sole cause of injury was the act of the men designated by the owner of the building to move the trestle. This moving was done, so far as the evidence shows, without the assistance of Biorci, or either of his men, and without any right in Biorci to give any direction as to how the work should be performed. As to the defendant Biorci, we think the evidence is insufficient to sustain the verdict. As to defendant Lankershim, we are in no doubt at all of the propriety of the verdict against him under the evidence disclosed by the bill of exceptions. It very plainly appeared that the trestle was caused to fall through the act of some of the men who were delegated by the contractor in charge of the general work. These were the men whom the owner had arranged should do that work. It was not necessary under these circumstances that the particular act, thing, or motion which caused the trestle to fall should be illustrated by direct evidence. On an appeal to the supreme court, taken in this same cause heretofore, it was said in the opinion of the court: "The decisive issue relates to the

position of the plaintiff at the time of the injury. That he was injured by the fall of a wooden trestle used in the building is not open to doubt. If, as he claimed, he was standing on the sidewalk, the mere fact that the trestle fell upon him from within is sufficient to make out a *prima facie* case of negligence on the part of the person or persons responsible for the management of the trestle." (*Gordon v. Roberts et al.*, 162 Cal. 506, [123 Pac. 288].) What has been said in the foregoing, answers several of the contentions advanced by the appellant Lankershim in the opening pages of his brief. There are alleged errors occurring during the trial which furnish the subject of some further argument made by this appellant. It is claimed that the court erred in not allowing a question to be asked of the plaintiff which called for a statement as to whether he felt able to pursue the same work that he did prior to receiving the injuries complained of. Both immediately before this question was asked, and afterward, the witness had stated that his health was at that time about the same, excepting such natural disability as might accrue by reason of the increase of his age. Also that, beyond the fact that he had felt pain frequently in the region of his left shoulder, there was no injury of which he could then complain. The jury could well draw a deduction from this testimony as to the ability of the plaintiff to pursue his customary work. The other errors assigned in the matter of rulings on the introduction of evidence have not more merit than that just discussed. In two instances objection was made after the witness had answered a question, but there was no motion to strike out the answer. Several instructions were offered to be given to the jury on behalf of the defendant and refused by the court. The court, on the question of the defense made as to the independent character of the contractors performing the work, under the state of the evidence as we have summarized it, gave instructions more favorable to the appellant than, we think, he was entitled to have submitted. After proof of the facts that the owner of the building agreed to have men furnished to move the trestles, and that such men did perform the work which resulted in injury being suffered by the plaintiff, the burden rested with the appellant Lankershim to show such facts as would warrant the conclusion to be drawn that the men so employed were acting in the capacity of independent contractors. This burden was not sustained in the

least degree. The instructions as given generally, we think, stated the law applicable to the case in hand. It is complained that there was error in allowing to be introduced an ordinance of the city of Los Angeles which required that a barricade be erected with a canopy over the sidewalk where building work was in progress. It was admitted that no such barrier was in existence at the time of the accident. It seems quite plain that had such a barrier been there constructed the probability of injury being suffered by plaintiff by reason of the falling of the trestle would have been greatly diminished or entirely obviated. The court very properly left it to the jury to determine as to whether the absence of such a barrier did contribute to produce the injury suffered.

At the oral argument it was suggested by counsel recently brought into the case there was an absence of proof that appellant Lankershim was the owner of the building being constructed. In making this statement counsel, no doubt unintentionally, overlooked that part of the record wherein the testimony of appellant Lankershim is set out. At page 128 of the transcript, counsel for plaintiff, while appellant Lankershim was on the witness-stand, remarked: "I believe it is admitted in the pleadings that Col. Lankershim is the owner of the building." Mr. Morton (counsel for Lankershim) answered, "Oh, yes."

From the conclusions we have arrived at after a careful examination of the record presented, we are of opinion that the judgment should be sustained as to Lankershim.

The judgment and order as to appellant James B. Lankershim are affirmed. The judgment against Achille Biorci and the order denying said appellant's motion for a new trial are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 4, 1916.

[Civ. No. 1780. Second Appellate District.—March 6, 1916.]

**FAIRBANKS, MORSE AND COMPANY (a Corporation),  
Appellant, v. W. A. ZIMMERMAN, Respondent.**

**CONTRACT—SALE OF PUMPING-PLANT EQUIPMENT—BREACH—EVIDENCE—  
BURDEN OF PROOF—CAPACITY OF WELL.**—In an action to recover damages for a breach of a contract for the sale of a pumping-plant equipment, which the vendor guaranteed was capable of lifting eighty inches of water, equivalent to 720 gallons per minute, provided the water in the well did not, when pumping, lower more than twenty feet below the pump, the burden is upon the vendee to affirmatively show that he had developed a sufficient amount of water in the well, which, had the plant been what it was guaranteed to be, would, if incapable of pumping the number of gallons per minute provided by the contract, at least have lifted a sufficient amount of water to meet the requirements of the vendee and not cause him any damage.

**ID.—CAPACITY OF OTHER WELLS—INSUFFICIENCY OF PROOF.**—Evidence that other wells, in the vicinity of the well in question, of varying depths, and ranging in distance from a quarter of a mile to a mile therefrom, which, after being developed, produced water in sufficient quantity to irrigate the lands tributary thereto, is not only vague, but wholly insufficient to establish the capacity of the well.

**ID.—FLOW IN OTHER WELLS—JUDICIAL NOTICE.**—Judicial notice cannot be taken that the flow of water in one well is evidence of a like flow in another well of different depth a mile or so distant.

**APPEAL** from a judgment of the Superior Court of Orange County, and from an order denying a new trial. W. H. Thomas, Judge.

The facts are stated in the opinion of the court.

Stutsman & Stutsman, and Maurice F. Enderle, for Appellant.

E. E. Keech, for Respondent.

**SHAW, J.**—Defendant was the owner of a farm in Kings County, upon which he had growing about seventy-five acres of young alfalfa. For the purpose of developing a supply of water with which, by means of a pump, to irrigate this field, he bored a twelve-inch well 250 feet in depth, with



a pit wherein to install a pump. He made a contract with plaintiff whereby the latter agreed to sell, deliver, and install at this well an engine, pump, and equipment, which it guaranteed to be capable of lifting eighty inches of water, equivalent to 720 gallons per minute, provided the water in the well did not, when pumping, lower more than twenty feet below the pump. The contract provided that plaintiff should not be held "liable for damage done or any trouble caused by reason of well . . . giving up sand, gravel, chips, or any substance other than clear water." Plaintiff installed the plant in the well which defendant had prepared therefor. The action is to recover the sum of \$1,082, which defendant agreed to pay for the plant, plaintiff alleging in its complaint that it had fully complied with the terms of the contract and guaranty contained therein; all of which allegations defendant in his answer denied, and, in a counterclaim filed therewith, alleged that the plant and equipment did not comply with the terms of the contract in that it was defective and failed to do the work and raise the water as guaranteed by plaintiff, by reason whereof he had sustained damage.

The court found that the plant and equipment so installed did not comply with the terms of the contract; that at the time of entering into the contract defendant had seventy-five acres of young alfalfa and a twelve-inch well 250 feet in depth, with an ample supply of water and a suitable pit, as described in said contract, already excavated and prepared for the installation of such an engine and equipment at said well; "that plaintiff knew the defendant's purpose in entering into said written contract was thereby, without delay, to secure from said well, and by said engine and equipment, a supply of water for irrigating said alfalfa; . . . and, had plaintiff so installed in workmanlike manner upon said property said engine and equipment capable of lifting eighty inches of water, equal to seven hundred and twenty gallons per minute, as in said written contract provided and guaranteed, defendant would have been enabled thereby to so irrigate said lands and perfect and produce successive crops of alfalfa thereon"; that the equipment installed by plaintiff pursuant to said contract upon said property, was not, and never has been, capable of lifting eighty inches of water, as guaranteed in said written contract, or any other amount; and that plaintiff has failed to make delivery of the machin-

ery described in said written contract, by reason of which failure defendant was unable to secure any water from said well for irrigating said alfalfa field, in consequence of which the alfalfa died; all to his damage in the sum of \$1,692.50. From these findings, as conclusions of law, the court found that plaintiff should take nothing by its action, and that defendant have judgment in the sum wherein it was found he had been damaged.

The appeal is from the judgment, and an order denying plaintiff's motion for a new trial.

Plaintiff insists that neither the findings of the court to the effect that it failed to comply with the contract, or to furnish and install the machinery in accordance with the terms thereof, nor the finding as to the resultant damage therefrom to defendant by the loss of his field of alfalfa, are supported by the evidence.

There is a substantial conflict of evidence, not only touching the question as to whether or not the machinery installed was free from defects and properly installed, but also as to whether the plant and equipment were capable of doing the work in accordance with the guaranty of plaintiff. For these reasons, the findings upon which the court based its conclusion that plaintiff should not recover upon the contract must be deemed fully supported by the evidence. Indeed, as we understand appellant's counsel, they do not otherwise seriously contend.

Appellant's chief contention is that there was no evidence to support the finding upon which the court based its judgment in favor of defendant for damages for the loss of his field of alfalfa. Conceding the pumping plant installed by plaintiff to have been, as found by the court, incapable of *lifting any quantity of water*, the loss of defendant's crop and resulting damage could not have been attributed to such fact, unless it was affirmatively shown by defendant that the well with the use of a pumping plant as guaranteed by plaintiff was capable of supplying a sufficient quantity of water with which to properly irrigate the land. Covering this point, the court found that defendant had bored upon his land a well wherein he had developed and which produced an *ample supply* of water for irrigating the field of alfalfa. This finding appears to be without any sufficient evidence to support it. Indeed, counsel for respondent concedes that, by

reason of the well being undeveloped, it did not produce a full supply of water; that the process of development, which required a period of some two or three weeks, consisted in pumping out from the bottom of the cylinder the surrounding sand and fine substance until a cavity was made having a surface of sufficient area through which the water percolated with sufficient rapidity to maintain a supply therein. There is nothing in the contract, however, which imposed upon plaintiff the duty of spending two weeks or more in pumping sand from the well in order to develop a supply of water therein. In fact, the provision quoted from the contract, to the effect that plaintiff should not be liable for damage done by reason of the well producing sand or substance other than clear water, tended to negative the existence of such obligation; and the claim is also inconsistent with the fact that, under the terms of the contract, plaintiff was required to operate the plant two days only, when defendant was to take charge of its operation. As we construe the contract, it was the duty of the defendant to furnish a developed well producing, when pumped, if not the guaranteed capacity of the plant, then at least a sufficient quantity of water to properly irrigate the alfalfa field, before he could claim damages against plaintiff for any loss by reason of the plant not pumping a sufficient amount of water. The only evidence of a direct character touching the capacity of the well tended to show that when the pump was started the water in the well was quickly exhausted, indicating an insufficient flow to maintain the water at a level to be picked up by the pump. Respondent, however, claims that there were other wells in the vicinity, of varying depths, and ranging in distance from the well in question a quarter of a mile to a mile therefrom, which *after being fully developed*, produced water in sufficient quantity to irrigate the lands tributary thereto. This evidence is not only vague and uncertain, since the quantity of water produced in such wells is not shown, but the fact that a well of one depth a mile distant produced an adequate quantity of water to irrigate a certain tract of land upon which one kind of crop was growing constitutes no evidence that the well in question must have produced a sufficient quantity of water to irrigate seventy-five acres of alfalfa. Respondent suggests that the court should take judicial notice of the geological formation and water-bearing strata existing in Kings

County. We know of no authority sustaining such contention, and respondent presents none, under which the court would be justified in taking judicial notice that the flow of water in one well is evidence of a like flow in another well of different depth, a mile or so distant. It devolved upon defendant to affirmatively show that he had developed a sufficient amount of water in the well, which, had the pumping plant been what it was guaranteed to be, would, if incapable of pumping 720 gallons per minute, at least have lifted a sufficient volume of water to irrigate his field of alfalfa. From aught that appears to the contrary, the lack of a sufficient amount of water produced by the well, and not the defective pump, was the proximate cause of the loss.

In our opinion, the evidence is wholly inadequate to support the finding of the court that the well in question had an ample supply of water developed therein, without which plaintiff could not be liable in damage to defendant for the loss of his crop for want of proper irrigation. For this reason that part of the judgment wherein it was adjudged that defendant should recover from plaintiff the sum of \$1,692.50 as damages, and the order denying a new trial of the issue as to plaintiff's right thereto, are reversed; and the judgment denying plaintiff's right to recover upon the contract, and that part of the order denying a new trial as to such right, are affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1969. Second Appellate District.—March 7, 1916.]

**SADIE G. FREDE, Appellant, v. JUSTICE'S COURT OF  
LOS ANGELES TOWNSHIP et al., Respondents.**

**APPEAL—DISMISSAL—WRIT OF REVIEW—ORDER DISMISSING PETITION.—**

A minute order dismissing a petition for writ of review, after the writ was granted, is not a judgment rendered upon the return of the inferior tribunal from which an appeal would lie, and the appeal should be dismissed; and under section 1075 of the Code of Civil Procedure, no hearing having been had after the return of the writ, the matter is still pending and should be heard.

**MOTION to dismiss an appeal from a purported judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.**

**The facts are stated in the opinion of the court.**

**Wm. C. Lewis, and Charles Robert McCarty, for Appellant.**

**Winslow P. Hyatt, for Respondents.**

**SHAW, J.**—This is a motion to dismiss an appeal from a purported judgment rendered in a proceeding instituted in the superior court for a writ of review directed to respondents. The ground for the motion is that no judgment was rendered from which an appeal would lie.

It appears from the judgment-roll that the writ was issued on May 12, 1915, and that pursuant thereto the respondent certified and transmitted a transcript of the record and proceedings in a certain action wherein Thomas B. Henley was plaintiff and petitioner herein was defendant; that thereafter, on May 21, 1915, a demurrer was filed to the petition, also a motion to quash the writ of review, which demurrer was overruled and the motion to quash denied. On the same date, as appeared from the minutes of the court, it was ordered that "petition for writ of review herein is denied." The appeal, as stated in the notice of motion, is "from the order of the above-entitled court denying plaintiff's petition for a writ of review, made by said court on June 21, 1915." Section 1075 of the Code of Civil Procedure, provides that "when a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below." In our opinion, the minute order from which the appeal is prosecuted is not a judgment rendered upon the return of the inferior tribunal from which an appeal would lie. It purports merely to be a denial of the writ upon the petition filed. But this is contradicted by the fact that the writ *was issued* and a *return thereafter made*. It does not appear, however, that any hearing was ever had upon the return. Since the writ was issued in response to the petition, the sole function of which was to secure the writ, and the court having denied defendant's motion to quash

the writ pursuant to which a transcript of the record of the proceeding was transmitted to the court, a hearing should be had thereon. As shown by the record before us, the matter is still pending in the superior court, no hearing having been had and no judgment having been rendered as directed by section 1075.

The appeal is dismissed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1672. Second Appellate District.—March 7, 1916.]

**S. P. BRADFORD, Appellant, v. SUNSET LAND AND WATER COMPANY (a Corporation), Respondent.**

**VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—WANT OF PERFORMANCE BY PLAINTIFF.**—The vendee under an option contract for the purchase of real estate, which provided that if the purchaser failed to make any of the payments as specified in the contract, the option should thereupon cease and determine, and the vendor should retain all sums paid "as the consideration and in full compensation for the option," is not entitled, upon default, to recover the money paid, but the vendor is entitled to retain the same.

**ID.—WANT OF ASSENT OF STOCKHOLDERS OF CORPORATION VENDOR TO SALE—DEFAULT OF VENDEE—POINT NOT AVAILABLE.**—In an action to recover the money paid under such an option contract which the vendee contended covered the entire business, franchise, and property of the corporation vendor, as a whole, the vendee is in no position to complain that the assent of the stockholders had not been obtained as required by section 361a of the Civil Code, where he had not paid, or tendered or offered to pay the balance due under the contract.

**ID.—CORPORATION LAW—ASSENT TO SALE OF PROPERTY—CONSTRUCTION OF CODE—OPTION CONTRACTS NOT INCLUDED.**—The provisions of section 361a of the Civil Code that "no sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock," etc., makes no reference to option contracts to purchase real estate.

**APPEAL** from an order of the Superior Court of Los Angeles County denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Milton K. Young, for Appellant.

Roger S. Page, for Respondent.

SHAW, J.—Action to recover money paid pursuant to the terms of an option contract for the purchase of real estate. Judgment went against plaintiff, whose motion for a new trial was by an order of court denied, and from which order he prosecutes this appeal.

On January 24, 1912, defendant, a corporation, executed a written document giving to plaintiff an option to purchase the property therein described. The portion of the agreement material to this inquiry is the following:

“Received of S. P. Bradford the sum of five hundred dollars (\$500), same being a deposit and part payment on account of purchase price for all those certain parcels of land situate in the county of Orange, state of California, described in deed from Sunset Beach Company, a corporation, to Sunset Land & Water Company, a corporation, recorded July 6th, 1904, in book 108 of deeds, at page 48, records of said county, excepting therefrom those certain lots or parcels of land designated sold on the plat of Sunset Beach hereto annexed and made a part hereof, together with all fixtures and improvements thereon, also all bills and accounts receivable and other personal property now owned by said Sunset Land & Water Company. Said property having this day been sold to said S. P. Bradford for the sum of forty-five thousand seven hundred and fifty dollars (\$45,750); the balance thereof being payable in the amounts and at the times following, to wit: \$500 on or before May 1, 1912, \$500 on or before June 1, 1912; \$44,250 on or before August 1, 1912. Upon completion of the payments aforesaid and the faithful performance of the covenants herein imposed, the seller will execute and deliver good and sufficient conveyance conveying said property to the purchaser, clear of encumbrance, excepting . . . If the purchaser shall fail to make any of the payments as and when specified above, or shall fail to perform any or all of the covenants herein imposed upon him, this option shall thereupon cease and determine and the seller shall be released from all further obligations hereunder, time

being of the essence of this agreement, and the seller may retain all sums theretofore paid hereon, the same being fixed as the consideration and in full compensation for the option hereby granted. . . . ”

In accordance with the terms of the option, plaintiff paid to defendant five hundred dollars on or before May 1, 1912, and five hundred dollars on or before June 1, 1912, which, together with the first payment, made one thousand five hundred dollars for the recovery of which this suit was instituted; but he neither paid, nor did he ever at any time tender or offer to pay, the sum of \$44,250 required by said instrument to be paid on or before August 1, 1912. By reason of this default respondent, by virtue of the provisions of the contract, was not only released from all obligations to sell, convey, or transfer the property described in the contract, but, as provided therein, entitled to retain the one thousand five hundred dollars so paid by plaintiff, which by the terms of the agreement was “fixed as the consideration and in full compensation for the option . . . granted.” (*Townsend v. Tufts*, 95 Cal. 257, [29 Am. St. Rep. 107, 30 Pac. 528]; *Scott v. Glenn*, 98 Cal. 170, [32 Pac. 983].)

Appellant, however, insists that the contract was made in violation of the provisions of section 361a of the Civil Code, and therefore void, and being void, defendant obtained no rights by virtue of its terms. The section is as follows: “No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two thirds of the issued capital stock of such corporation; such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by vote at a stockholders’ meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid; provided, however, that nothing herein contained shall be construed to limit the powers of the directors of such corporation to make sales, leases, assignments, transfers or conveyances of corporate property other than those hereinabove set forth.” It will be seen that the section makes no reference to contracts of the character here involved, the inhibition being as to the

"sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole," unless the prescribed conditions are complied with. Until plaintiff performed or offered to perform the covenants imposed upon him as a precedent condition to the conveyance of the property by defendant, he was in no position to complain of the want of the action on the part of stockholders in giving assent to a sale and conveyance as to which, under the terms of the contract, he had lost all right. (*Laffey v. Kaufman*, 134 Cal. 391, [86 Am. St. Rep. 283, 66 Pac. 471]; *Leach v. Rowley*, 138 Cal. 709, [72 Pac. 403].) Conceding the option covered the entire "business, franchise and property, as a whole," nevertheless there is no ground for plaintiff's contention for the reason that the contract did not purport to constitute a sale, transfer or conveyance of the property, but was a mere option to purchase, the exercise of which on the part of plaintiff, and paying or offering to pay the purchase price in the manner therein specified, was necessary in order to place him in a position where he could, in any event, complain of the failure of stockholders to signify assent. The option, however, does not purport to cover and include the entire business and franchise of the corporation. It appears from the evidence, without contradiction, that defendant was engaged in a general real estate business, no mention of which, or its franchise, is made in the contract. Construing the contract as a sale of the property described therein, there was nothing to prevent the corporation from continuing its business. (*Shaw v. Hollister etc. Co.*, 166 Cal. 257, [135 Pac. 965].) As thus viewed, section 361a is not applicable to the transaction.

The order denying plaintiff's motion for a new trial is affirmed.

James, J., concurred.

Conrey, P. J., concurred in the judgment.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 4, 1916.

[Civ. No. 1471. Third Appellate District.—March 7, 1916.]

**UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), Respondent, v. E. C. DICKINSON et al., Appellants.**

**GUARANTY—TIME OF COMMENCING ACTION—CONSTRUCTION OF INSTRUMENT.**—Under the terms of a written guaranty providing that upon the default of the debtor the guarantee may, at its option, proceed directly and “at once” against the guarantors, to collect the full amount of the liability thereunder, or any portion thereof, without first proceeding against the debtor, or foreclosing upon, selling, or otherwise disposing of any collaterals it may have as security for the indebtedness, the right to recover is not lost by the failure to bring the action immediately upon the maturity of the promissory note given to evidence the indebtedness, as the words, “at once,” were clearly intended only to emphasize the right intended to be vested by the instrument in the guarantee to proceed against the guarantors as independent obligors.

**ID.—PLEADING—CORPORATION INDEBTEDNESS—AUTHORITY TO EXECUTE—UNNECESSARY ALLEGATION.**—In an action to recover on such a guaranty it is not necessary that the complaint should allege that the execution and delivery of the promissory note, the payment of which the guaranty secured, was authorized by a resolution of the board of directors of the corporation maker, as such question involved an evidentiary fact.

**ID.—MAKER OF NOTE—UNNECESSARY DEFENDANT.**—In such an action it is not necessary to join the maker of the note as a party defendant, it not being a party to the contract of guaranty.

**ID.—ACCOUNTING—UNNECESSARY CONDITION PRECEDENT.**—It is not necessary that an accounting be first had to ascertain the balance due to the plaintiff, where the transaction involved the mere matter of a loan of a definite sum of money and the payment of a certain sum in part satisfaction thereof.

**ID.—NAMES OF GUARANTORS—OMISSION IN BODY OF INSTRUMENT—VALID GUARANTY.**—A guaranty is not defective because the names of the guarantors do not appear in the body of the instrument, where the name of the guarantee is contained therein, and the names of the guarantors are subscribed at the bottom thereof, and referred to in the body of the instrument as “the undersigned.”

**ID.—EVIDENCE—AUTHORITY TO EXECUTE NOTE—MINUTE-BOOK.**—In such an action the minute-book of the corporation is admissible as evidence to show that the promissory note in question was executed by the officers of the corporation by the authority of the latter, duly authenticated by a resolution adopted by the board of directors.

**ID.—EXECUTION AND DELIVERY OF NOTE—DEFECTIVE ALLEGATION.**—An allegation in the answer, in connection with the admission and due delivery of the note, that the defendants have no copy of the note and no recollection of the “words and phrases” of the note as set out in the complaint, and having no other information upon the subject sufficient to enable them to answer said allegations more specifically, and placing their denial upon that ground, deny that the alleged copy of the note set forth in the complaint is a correct copy thereof, is a defective allegation, and tenders no issue.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Daniel O’Connell, and L. Horwitz, for Appellants.

Heller, Powers & Ehrman, and James L. Robison, for Respondent.

**HART, J.**—This action was instituted by the plaintiff to recover on a certain guaranty executed by the defendants guaranteeing the payment of any and all indebtedness, not to exceed twenty thousand dollars, which the Baker-Ensign Refining Company, a corporation, might, at the time of the execution of the guaranty, or at any time thereafter, owe to the plaintiff.

Judgment was awarded the plaintiff in the sum of twelve thousand five hundred dollars and accrued interest, the sum of seven thousand five hundred dollars having been paid on the note previously to the commencement of this action.

This appeal is by the defendants from the judgment and the order denying them a new trial.

The complaint alleges: “On or about the 10th day of December, 1910, at the city and county of San Francisco, state of California, the defendants made, executed and delivered to the plaintiff for valuable consideration, a certain instrument in writing whereby the said defendants jointly and severally guaranteed to the plaintiff unconditionally and at all times the prompt payment in United States gold coin of the then present standard of weight and fineness of any and all indebtedness which said Ensign-Baker Refining Company, then doing business at 24 California Street, San Francisco,

might then or at any time thereafter owe to the plaintiff to the extent of and not exceeding the sum of twenty thousand dollars, and said written instrument contained certain other promises and agreements on the part of the defendants, and each of them, to and with the plaintiff, all of which promises and agreements are fully set out in the said instrument in writing, a true copy of which is hereto annexed and is hereby made a part of this complaint in the same manner as if the same were fully set forth herein."

On the fifteenth day of December, 1910, so the complaint further alleges, said Ensign-Baker Refining Company made, executed, and delivered to the plaintiff its promissory note for the sum of twenty thousand dollars to evidence the loan of said sum by the plaintiff to the said refining company. Said note is set out *in haec verba* in the complaint, and is made payable one day after date. The complaint alleges the payment of seven thousand five hundred dollars on said note, alleges that there is unpaid and due the plaintiff on said note the sum of twelve thousand five hundred dollars and interest, and prays for judgment against the defendants and each of them for the amount so remaining unpaid on the principal, with interest.

The written guaranty contains the following clause: "Upon any default of the debtor, said Union Trust Company of San Francisco may, at its option, proceed directly and at once against the undersigned to collect the full amount of the liability hereunder, or any portion thereof, without first proceeding against the debtor or foreclosing upon, selling or otherwise disposing of any collaterals it may have as security for such indebtedness."

The defendants demurred to the complaint on both general and special grounds. Thus it is urged that the complaint does not state sufficient facts, that the Ensign-Baker Refining Company should have been joined as a defendant, and that the complaint is defective in failing to disclose an accounting to ascertain the balance due to plaintiff on the note, such an accounting, so it is claimed, being necessary.

The principal points made under the demurrer, however, are that the plaintiff lost its right of action on the guaranty by a failure to bring an action thereon immediately upon the note falling due, to wit, on the sixteenth day of December, 1910, this action having been commenced on the fifteenth day

of October, 1913, or two years and ten months after the note became due and payable; that there are certain defects in the form of the written guaranty, and that the complaint is defective in not stating that the promissory note of the corporation was authorized by resolution duly and regularly adopted by its board of directors.

The first point—that of laches—arises from the construction put upon the above-quoted part of the instrument of guaranty by the defendants, the claim being that the plaintiff, to avail itself legally of the option given it by the guaranty to proceed directly against the guarantors, should have done so immediately upon the note falling due and the default of the maker in satisfying it at that time, and that, having failed so to proceed, it lost its right to sue on said obligation. We do not agree to the construction thus given the instrument sued on.

The clause of the guaranty above quoted was merely intended to authorize the plaintiff, if it so elected, to proceed against the guarantors directly, and without first looking to the principal debtor for the extinguishment of the obligation, and without seeking to recover satisfaction thereof by resort to any collateral security which may have been pledged for its payment. The words, “at once,” as used in the instrument of guaranty, and which are interpreted to mean that the intention was that the plaintiff, if it elected to exercise the option to sue the guarantors, should proceed upon the guaranty *immediately* upon default by the maker of the note in the payment thereof, or forfeit any benefit which it was to derive from the guaranty, were clearly intended only to emphasize the right intended to be vested by the instrument in the plaintiff to proceed against the guarantors as independent obligors or, in effect, as the guaranty clearly contemplates, as though they were the principal debtors. Moreover, the complaint alleges that the refining company paid the seven thousand five hundred dollars on the principal and “all interest thereon accruing up to and including the 30th day of June, 1913, and no more, leaving a balance unpaid on the principal sum of said promissory note of the sum of \$12,500.00 and interest thereon from and after the 30th day of June, 1913,” etc. Either the failure by the maker of the note to pay the full amount on said thirtieth day of June, or its failure to pay the balance on some date subsequent thereto, and before the com-

mencement of this action, constituted the default which authorized the plaintiff, under the express terms of the guaranty, to proceed directly against the guarantors, and giving the words, "at once," the interpretation ascribed to them by the defendants, it would be unreasonable to hold that a delay of one or two months or, at the most, less than four months after the default in bringing the suit on the guaranty constituted laches fatal to the right of the plaintiff to maintain an action on that instrument.

The defendants have in their briefs cited many cases which they assume sustain their position as to the claim of laches on the part of the plaintiff in bringing this action. It is not necessary to review those cases herein. It is enough to say that none of them has any application to the present case. They undoubtedly state the true rule applicable to guarantors and indorsers of promissory notes and the rule requiring the plaintiff, where he proceeds against an indorser or guarantor, to show by his complaint, as essential to the statement of a cause of action in such case, an excuse for what may on its face appear to be an unreasonable delay in making a demand for the payment of the money due on the obligation. For illustration, in the case of *Jerome v. Stebbins*, 14 Cal. 457, it is said (quoting the syllabus): "An indorser of a note payable on demand, no demand being made until thirteen months after the indorsement to plaintiff, is, *prima facie*, not liable." The court held that the delay of thirteen months in making demand for payment was unreasonable, but that if there were any circumstances legitimately excusing the delay, they constituted an essential part of the plaintiff's case, and should, therefore, have been alleged in the complaint. (See *Johnston v. Santa Clara County*, 28 Cal. 547; *Daley v. Russ*, 86 Cal. 114, 117, [24 Pac. 867], both cases holding that a valid excuse for unreasonable delay in the performance of an act required of the plaintiff by contract must be pleaded by the plaintiff when suing upon the contract.)

Obviously, as stated, those cases have no bearing upon or relevancy to the question presented here and now under discussion. The defendants here, by their instrument of guaranty, bound themselves to an independent and unconditional obligation—that is, an obligation whereby they bound themselves to stand for the default of a third party regardless of whether the obligee could or could not secure satisfaction from

such third party. In brief, and paraphrasing the language of the guaranty, the guarantors in effect said to the plaintiff: "Advance money to the refining company in any sum required by it, and we will, upon the default of the company in the payment thereof, ourselves repay the money so loaned, without regard to the obligation of the company to pay or any collateral it may pledge to you to secure the debt, and you may, upon such default, proceed against us directly for the satisfaction of the debt as fully as though we were the principal debtors." Thus it will be observed that, as above stated, the plaintiff in this case was not required, as a condition precedent to the exercise of the right to proceed against the guarantors, as was true in the case above cited, and also in the case of *Penniman v. Hudson*, 14 Barb. (N. Y.) 579 (cited by the defendants), in which the guarantors guaranteed the payment of certain debts of a certain firm due to the creditor upon the condition that the latter was not able, by *due and legal diligence*, to collect the same from the firm, to look first to the principal debtor and use all reasonable diligence to secure from it satisfaction of the indebtedness.

There is certainly no merit in the second point urged against the guaranty, viz., that it is defective as such an obligation because the names of the guarantors do not appear in the body thereof. As is suggested by counsel for the plaintiff, the operative words of the guaranty are "the undersigned hereby guarantee unto said Union Trust Company of San Francisco, its successors and assigns unconditionally and at all times the prompt payment," etc., and to the instrument and at the foot thereof are subscribed the names of the defendants.

We are aware of no rule of law which, to bind the parties to a contract, imperatively requires the names of all such parties to be inserted in the body of the instrument. If the contract shows, by some reference, who the parties to the contract are and so sufficiently identifies them, it is sufficient. (Browne on Statute of Frauds, sec. 372.) The body of the instrument sued on here contains the name of the party to be guaranteed, and the names of the defendants subscribed at the bottom of the instrument show who the guarantors are. Thus the instrument clearly contains and sufficiently shows the names of all the parties intended to be bound by the contract.

The case of *Williams v. Lake*, 2 El. & E. 349, [121 Eng. Reprint, 132], cited by the defendants, involved an action on

a guaranty. The court held it not to be a sufficient agreement, because, while the instrument was signed by the guarantor, "it turns out to be in blank so far as regards the name of the party to be guaranteed." Some general observations then follow as to the essentials of a valid agreement, and among these is that it should contain the names of both parties thereto. That case, however, contains no statement which supports the proposition that a contract of guaranty is not sufficient to bind the guarantors where the name of the guarantee appears in the body of the instrument, and the guarantors have signed their names at the foot of the instrument, identifying themselves as parties thereto by referring to themselves in the body thereof as "the undersigned." What more should be required to make it perfectly clear that the Union Trust Company of San Francisco, and the "undersigned" are all the parties to the agreement, we are unable to conceive. No more is required of the ordinary promissory note, whose validity cannot justly be questioned because the name of the maker is not, *eo nomine*, stated in the body of the instrument. Indeed, contracts are not uncommon where a party thereto, particularly the promisor, without stating his name in the body thereof, refers to himself therein in the first person by means of the appropriate personal pronoun, or by the words, "the undersigned," and it would be absurd to say that the person signing such contract at the foot thereof is not the person thus referred to and who so intended to bind himself to the terms of the agreement as one of the parties thereto.

The next point urged under the demurrer is that the complaint itself is fatally defective in that it omits to state that the execution and delivery of the promissory note concerned here was authorized by a resolution of the board of directors of the corporation.

The point is not well taken. Whether the corporation did or did not authorize the execution and delivery to the plaintiff of the note involves an evidentiary fact, which it would be contrary to the very first rules of good pleading to aver in the complaint. If the officers of the corporation who signed and executed the note had no legal authority to do so, that fact is or was a matter of defense. (*Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 42, [18 Pac. 858].) The note as pleaded purports to be the corporate act of the corporation "and it

was not necessary to allege that the president and the secretary were authorized by resolution of the directors to execute the instrument." (*Union Trust Company of S. F. v. Ensign-Baker Refining Co.*, 22 Cal. App. Dec. 335.)

Nor was it necessary to join the maker of the note as a party defendant to this action, as defendants further contend. As shown above, the instrument of guaranty constituted solely the contract of the defendants. The refining company, although the maker of the note, the payment of which is guaranteed by the defendants, is not a party to the agreement of guaranty, by which the guarantors invested the plaintiff with the right or option to proceed against them upon their guaranty, upon default in the payment of the note or any portion thereof by the maker, and this independently of the liability of the maker.

The contention that the action cannot be maintained because there was no accounting had to ascertain the balance due the plaintiff is not tenable. The transaction between the plaintiff and the corporation out of which this action grows involves the mere matter of a loan of a definite sum of money and the payment of a certain sum in part satisfaction thereof. It is not a case of "mutual accounts" in the strict technical sense of that phrase, nor does the transaction involve circumstances of great complication. The amount loaned is alleged, the evidence of the loan (the note) set out, and the amount paid by the borrower on account thereof definitely specified and stated. The ascertainment of the balance due on the note was capable of ready ascertainment in this action without any other or further accounting than might be involved in the proof of the note and of the payment or payments made thereon.

The remaining assignment involves an attack upon certain rulings admitting certain evidence. The first of these objections relates to the admission in evidence of the minute-book of the Ensign-Baker Refining Company for the purpose of showing that the promissory note set out in the complaint was executed by the officers of the corporation by the authority of the latter, duly authenticated by a resolution adopted by its board of directors.

We think the book constituted proper and competent means for proving the adoption by the board of directors of the resolution authorizing the borrowing of the money from the



plaintiff, and the execution of the promissory note as evidence of the loan. C. A. Eaton, the secretary of the corporation at the time of the trial, testified that he was not such officer of the corporation at the time of the transaction referred to, but that his predecessor, L. E. Ensign, turned the minute-book containing a record of said transaction over to him (Eaton) when he took possession of the office of secretary, and that said minute-book was the only book which contained the minutes of the proceedings of the board of directors on the occasion of the adoption of the resolution authorizing the transaction. E. J. Ensign, father of L. E. Ensign, and president of the corporation during the time his son was secretary, identified his own signature, as president, to the minutes of the proceedings of the directors on the occasion mentioned as preserved in the book admitted in evidence, and identified the signature of his son thereto as secretary. We think this evidence was sufficient to justify the ruling admitting the book in evidence for the purpose of showing the authority for the execution of the note. The law requires such records to be kept by a private corporation (Civ. Code, sec. 377), and we can conceive no just reason why they should not be admissible, at least as *prima facie* proof of an act which is an essential predicate of a corporate transaction of the character of the one here. It is true that the entries in the books of a corporation showing its transactions are, as a general rule, not admissible against or binding upon third parties. We do not, however, look upon the defendants as "third parties." They in substantial effect, by their contract of guaranty, made themselves the principal debtors. But there is another reply to the objection in the fact that the defendants, in their answer, substantially admit the due execution of the note, and, in such case, proof of the fact of the due execution of the obligation is wholly unnecessary and, indeed, supererogatory. It is true that the answer, in connection with the admission of the due execution and delivery of the note, declares that the defendants have no copy of the note and no recollection of the "words and phrases" of the note as set out in the complaint, "and having no other information upon the subject sufficient to enable them to answer said allegations more specifically, and placing their denial upon that ground, they deny that the alleged copy set forth in paragraph 4 of said complaint is a correct copy of the promissory note." But

this allegation is defective, and tenders no issue upon that question because: 1. It involves a sort of negative pregnant, in that it itself virtually admits the execution and delivery by the refining company to the plaintiff of a promissory note for the amount for which the pleaded note calls; 2. The purported denial that the note as pleaded is a correct copy of the note executed is not, strictly, the statutory denial where the allegation is based upon a want of information or belief upon the subject to which the allegation is addressed. (Code Civ. Proc., sec. 437, subd. 2; *Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 541, [129 Pac. 801].)

It is next contended that the plaintiff failed to prove that the defendant, Dickinson, joined in the making of the guaranty. But the answer expressly admitted the execution of the instrument of guaranty as pleaded in the complaint and hence, as last above suggested, the plaintiff was relieved of the burden of proving that fact.

There were some other rulings upon the evidence to which exceptions were reserved at the trial and objections urged here, but they are not deemed to be of sufficient importance to call for special notice herein.

It appears from respondent's brief that the defendants, on taking the appeal to the supreme court in this case, attempted to give a stay bond, but the attempt proved futile because of the failure of the sureties to justify when excepted to. Thereafter the defendants, it is likewise made to appear, applied to the supreme court for a writ of prohibition to restrain the execution of the judgment, but the application was disallowed. The supreme court, however, made an order to show cause why a *supersedeas* should not be granted and, upon hearing the matter, held that the sureties on the stay bond had failed to justify conformably to law and that, therefore, the bond filed in the superior court was of no force or effect, and thereupon ordered that a *supersedeas* should issue, and that all proceedings on the judgment should be stayed pending the appeal, upon the condition that the defendants file in the supreme court a new bond with sufficient sureties, to be approved by the judge of the superior court. Respondent's brief declares that the defendants thereupon gave a new bond in the penal sum of twenty-six thousand dollars, and that the same was approved as prescribed by the order requiring it to be filed.

We are now asked that we expressly authorize the entry of the judgment, if it be affirmed, against the sureties on the *supersedeas* bond above referred to. We cannot do this. Assuming that the course suggested would be warranted in a proper case, there is no record in this court of the proceedings culminating in the filing of the *supersedeas* bond, and we, therefore, have no record knowledge of the filing of said bond and know nothing of its conditions. The request must, therefore, be denied.

For the reasons herein stated, the judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 1763. First Appellate District.—March 8, 1916.]

JAMES E. MITCHELL INNES, Respondent, v. MANDEL  
H. GOLDWATER, Appellant.

**PAWNBROKERS—RECOVERY OF PLEDGED PROPERTY—EXCESSIVE INTEREST—ENTRY IN REGISTER—ABSENCE OF ESTOPPEL.**—In an action to recover certain personal property pledged to a pawnbroker as security for several loans, the plaintiff is not estopped from introducing oral proof that he was charged a rate of interest in excess of two per cent per month, and that he actually made payments at such excessive rate for several months, by reason of the fact that at the time of making such loans he signed an entry in the defendant's register reciting that the rate of interest was to be two per cent per month, and therein acknowledged that he had received a copy of such register and redelivered it to the defendant.

**ID.—LEGALITY OF CONTRACT—TENDER OF AMOUNT OF PRINCIPAL OF LOANS—CONDITION PRECEDENT TO RECOVERY.**—In such an action the plaintiff is not entitled to recover without first tendering and offering to repay to the defendant the amount of his original loans, notwithstanding the violation by the defendant of the provisions of section 340 of the Penal Code, as the contracts for such loans are not wholly void, but legal so far as the principal sums of such loans, and the security therefor, are concerned, and only illegal as to the interest.

**ID.—REGISTER OF PAWNBROKER—FAILURE TO DELIVER COPY TO PLEDGOR—VALIDITY OF CONTRACT.**—The failure of the pawnbroker to deliver to the pledgor a copy of his register entries as required by section 339 of the Penal Code does not render the contracts for the loans invalid, as the only penalty imposed by the section is a fine.

APPEAL from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

Fitzgerald, Abbott & Beardsley, for Appellant.

Donald Horne, and D. C. Dutton, for Respondent.

RICHARDS, J.—This is in form an action brought to recover certain personal property pledged to the defendant as security for several loans made to plaintiff by the defendant, doing business under the name of California Loan Office. The answer of the defendant consisted in denials of the plaintiff's ownership and right to the possession of the said property.

Upon the trial the following practically undisputed facts appeared in evidence: The defendant was a pawnbroker regularly licensed and qualified under the statute, engaged in that business. The plaintiff came to him from time to time to borrow money, pledging different articles of the property in question as security for these several loans, until they aggregated the sum of \$396.50. The plaintiff made several payments on account of these loans in small sums, which aggregated in all \$34.50. He finally failed or refused to make further payments, and the defendant undertook to sell out said property for the balance remaining due upon the debt, whereupon this action was brought. It further appeared in evidence that on the occasion of these several loans defendant made an entry in his register, which he required the plaintiff to sign, and which was in the following form:

"No. 36,193.

Date Feb. 28, 1914.

"Copy of Register from California Loan Office, Oakland, Cal.

"Description of property pledged and estimated value of property sold. Jewelry. Amt. loaned \$250.00, interest at the rate of 2 per cent per month. This is to certify that I have received this copy of register and returned same to California Loan Office, to be its custodian till called for by me within the date of its duration, which is seven months from date.

"Name J. E. M. INNES,

"Residence, 474 Jean st., Oakland."

It does not appear that the defendant ever actually delivered to the plaintiff a copy of this register entry as the law (Pen. Code, sec. 339) requires, but that he did deliver to the plaintiff a pawn ticket in which the rate of interest to be charged was not specified.

The plaintiff at the trial undertook to show by his oral testimony that at the time of these several loans the interest actually agreed upon and charged was more than two per cent per month, that the agreement was that he was to pay four per cent per month, and that he actually made payments at said rate of interest for several months. To this evidence the defendant objected upon the ground that the above register entry, which the plaintiff signed, constituted an agreement in writing as to the rate of interest to be charged, which the plaintiff could not be permitted to vary by parol.

We cannot agree with this contention. The matters contained in the foregoing register entry which the defendant was required to make under the above section of the Penal Code, while a memorandum of the loan made by the defendant, could not be binding upon the plaintiff in the first instance, even though a copy of the register had actually been delivered to him as the statute requires. The added portion of such entry beyond the requirement of the code was an attempted evasion of its terms, and amounted only to an acknowledgment on the part of the plaintiff that he had received from and redelivered to the defendant a copy of the register entry. In signing this admission of what was not the fact, the plaintiff could in no just sense be held to have estopped himself by his signature from proving that the rate of interest was other than that specified in the register entry. The court, therefore, properly overruled the defendant's objection to the plaintiff's oral proof that he was charged a rate of interest upon these several loans in excess of two per cent.

Having made this proof the plaintiff contended, and the court found, that the several contracts between the plaintiff and the defendant for these loans, and for the pledge of the property in question as security therefor, were wholly void because in contravention of section 340 of the Penal Code, which reads as follows: "Every pawnbroker who charges or receives interest at the rate of more than two per cent per month, or who by charging commissions, discount, storage, or other charge, or by compounding increases, or attempts to

increase, such interest, is guilty of a misdemeanor." The court therefore held that said contracts being wholly void, the plaintiff was entitled to recover the pledged property without paying or offering to pay his loans, and rendered its judgment accordingly in plaintiff's favor.

The question which is thus presented is as to whether the violation by the defendant as a pawnbroker of the terms of section 340 of the Penal Code renders the transactions, whereby the defendant charged and received a rate of interest in excess of two per cent per month in violation of the said section, so wholly void as to entitle the pledgor to recover his property without paying or offering to pay the amount of his several loans.

In the early case of *Jackson v. Shawl*, 29 Cal. 267, the supreme court, in construing the statute of 1861, which regulated the rate of interest to be charged by pawnbrokers, and made it a misdemeanor to make interest agreements and charges in excess of such rate, held that the contract between the parties for the loan and pledge being legal as to the principal sum loaned, and only illegal as to the rate of interest to be charged, the entire contract was not void, but that the illegal portion thereof was so separable that the borrower could only recover the pledged property by tendering the pawnbroker the amount of the original loan with such interest thereon as was lawfully permitted to be charged. With this construction of said statute its terms were practically embodied in section 340 of the Penal Code, the only substantial difference between the statute and the code being that the chargeable rate of interest was reduced in the code section from four to two per cent. The respondent herein contends, however, that the rule laid down in *Jackson v. Shawl*, *supra*, has been changed and that case practically overruled by the supreme court in *Levinson v. Boas*, 150 Cal. 185, [11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825], wherein the court held that the contract between the pledgor and a pawnbroker, when such pawnbroker was acting in violation of law in doing business as such, and in making such contract without having taken out a license as required by section 338 of the Penal Code, was wholly void; and that the receiver in bankruptcy of the borrower was entitled to recover the property pledged for such loan without tendering or offering to pay the amount of the loan. It is to be noted, however, that the court in

the last above-cited case, far from overruling the case of *Jackson v. Shawl*, made this comment upon it: "It is to be noticed that the illegality of the contract in *Jackson v. Shawl* went only to the excess of interest charged, and this court applied the general and liberal principle fully recognized by law that when any matter, void even by statute, be joined with good matter which is entirely independent of it, the good part shall stand and the rest be held void. But in the case at bar the illegality and the prohibition go to the whole substance of the contract. It is a prohibition by law from entering into such a contract at all, and the illegality affects the whole transaction from the inception." (*Levinson v. Boas*, 150 Cal. 185, [11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825].)

In the light of this express approval of the principle declared in the case of *Jackson v. Shawl*, we are constrained to give application to that principle in the case at bar to the extent of holding that the agreements of the plaintiff with the defendant for these several loans and pledges were legal in so far as the principal sum of such loans and the security therefor were concerned, and only illegal as to the interest to be charged, and hence that the plaintiff was not entitled to recover the personal property so pledged and made the subject of this action without first tendering and offering to repay to the defendant the amount of his original loans.

Whether the plaintiff was also required to make an additional tender of any sum as interest up to or less than the sum of two per cent, the statutory limit of a pawnbroker's legal exaction, we are not required in this case to determine, for the reason that it differs from the case of *Jackson v. Shawl*, 29 Cal. 267, in respect that thus far in the instant case no tender of either principal or interest in any sum is shown to have been made.

It is necessary to notice but one other contention of the respondent. It is that the agreements for the several loans between the plaintiff and the defendant were invalid, for the reason that the defendant did not actually deliver to the plaintiff a copy of his register entries as required by section 339 of the Penal Code. There is some language in *Levinson v. Boas*, 150 Cal. 185, [11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825], which might seem to support this contention; but the question has been put at rest by the more recent case of *Wood v. Krepps*, 168 Cal. 382, [L. R. A. 1915B, 851, 143

Pac. 691], wherein the court, in passing upon the precise point in issue, says: "The theory of the defendants in alleging that the plaintiff had failed to give them the memorandum or notice of the contents of the note and mortgage and other matters provided for by section 5 of the said act of 1909 at the time the note and mortgage were executed, is that such failure precluded any recovery by plaintiff. But this theory is erroneous. While the section relied on provides that when a loan such as here is made a memorandum or notice of the contents of the note and mortgage and other matters shall be given the mortgagees, it is not made by the statute essential to the validity of the transaction that this shall be done. It is a statutory duty imposed upon the personal property broker to be performed by him when the loan is made, but after the instrument taken as security is executed. It is a matter which does not at all enter into the contract between the parties, but is collateral to it. The statute itself provides that as a penalty for failure to give the memorandum or notice the broker shall be subjected to a fine not exceeding the specified amount. This is the only penalty which the statute imposes. No further penalty is declared, and the contract itself is not in any manner affected by the failure to comply with this provision of the section."

It follows from the foregoing views that the judgment must be reversed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 7, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 4, 1916.

[Civ. No. 1781. Second Appellate District.—March 8, 1916.]

**NATHAN RIGDON et al., Respondents, v. THE COMMON COUNCIL OF THE CITY OF SAN DIEGO, CALIFORNIA (a Municipal Corporation), et al., Appellants.**

**CERTIORARI—ANNULMENT OF PROCEEDINGS OF PUBLIC BODY—CAPACITY OF PETITIONERS.**—On *certiorari* proceedings to annul a resolution of the common council of a municipal corporation, the matter of the competency of the petitioners to sue, or the sufficiency of the petition in its statement of facts showing such competency, should be raised and determined by objection appropriately expressed by demurrer or motion to dismiss the proceeding, and where the objection is not thus raised, and the return to the writ has been made, the petitioners are not required to make proof of their capacity.

**ID.—MUNICIPAL CORPORATION—REPEAL OF LIQUOR ORDINANCE—FILING OF REFERENDUM PETITION—SUSPENSION OF ORDINANCE—CONSTRUCTION OF SAN DIEGO CHARTER.**—An ordinance of the city of San Diego repealing an ordinance making it unlawful for any person to engage in retailing intoxicating liquors outside of a designated portion of the city is suspended under the charter provisions of such city by the filing of a referendum petition against the repealing ordinance within thirty days after its passage.

**ID.—RESOLUTION AWARDED LIQUOR LICENSE—QUASI-JUDICIAL FUNCTION.** Under the charter of the city of San Diego, a resolution of the common council awarding a liquor license is a *quasi-judicial* proceeding, and therefore reviewable on *certiorari*.

**ID.—LIQUOR ORDINANCES—REPEAL BY IMPLICATION.**—A municipal ordinance adopted for the direct purpose of marking out the boundaries of the zone outside of which there should be no retail liquor establishments allowed, is not repealed by implication by the adoption of an ordinance which, in its plain import, was designed to regulate the granting of licenses within the zone where liquor-dealing establishments were permitted.

**APPEAL** from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

T. B. Cosgrove, City Attorney, for Appellants.

John W. Rummage, and Haines & Haines, for Respondents.

**JAMES, J.**—On *certiorari* petitioners herein secured a judgment annulling a certain resolution of the common coun-

cil of the city of San Diego, by which resolution a retail liquor license was attempted to be awarded to one Green. The writ issued brought before the trial court for review the resolution, the validity of which is questioned by the proceeding, as well as certain ordinances and other records of the city of San Diego. After an amended return had been made, the petitioners moved for judgment to be entered as prayed for upon the record presented in the return, and the judgment appealed from was entered responsive to such motion. The appellants brought up in their record the papers designated by section 1077 of the Code of Civil Procedure, which provides, referring to the record in proceedings of *certiorari*, that "a copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll."

Preliminarily it is contended on behalf of the appellants that they were not accorded a hearing on the petition and writ; in other words, it is their contention that the petitioners should have been put upon proof as to all of the allegations of their petition, including the allegation as to the competency of the petitioners to appear in the proceeding. They claim the right to have tried the question as to whether the parties petitioning were "beneficially interested," as section 1069 of the Code of Civil Procedure requires that they shall be before they are entitled to invoke the aid of the court in annulling a proceeding of a public body. They assert that, under the procedure outlined in the chapter of the code regulating *certiorari* proceedings, they were not entitled to file an answer controverting the allegations of the petition, and cite *Stumpf v. Board of Supervisors*, 131 Cal. 364, [82 Am. St. Rep. 350, 63 Pac. 663], cited in *Townsend v. Parker*, 21 Cal. App. 317, [131 Pac. 766]. In the *Stumpf* case, the court said: "The return to the writ constitutes the answer, as well as evidence, and the case is heard thereon, unless upon motion an additional or amended return is made." There might be added to this citation, *Reynolds v. County Court*, 47 Cal. 604; *Rauer v. Justice's Court*, 115 Cal. 84, [46 Pac. 870]. If the return was not complete in showing all of the facts essential to any defense which respondents were entitled to make to the writ, these facts could have been certified, or the court upon motion had the right to order a statement of them into the record. (*Stumpf v. Board of Supervisors*, 131 Cal. 364, [82 Am. St. Rep. 350, 63 Pac. 663].) We do not agree with

counsel for appellants in his contention that, after the return to the writ was made, and no other steps were taken on behalf of the respondents in the proceeding to question the sufficiency of the petition as to the capacity of the parties petitioning to sue, the court should have demanded proof upon the allegation as to the interest it was asserted the plaintiffs had in the matter sought to be reviewed. At such a point in the proceedings, and upon such a state of the record, the court was entitled to consider the case upon the issue of law presented by a motion for judgment upon the facts shown in the return. The matter of the competency of the parties to sue, or the sufficiency of the petition in its statement of facts showing such competency, should all have been raised and determined by objection appropriately expressed by demurrer or motion. A demurrer would call into question the sufficiency of the facts alleged in the petition showing the competency of the parties petitioning; a motion to dismiss could have been made challenging the existence of the facts asserted showing the beneficial interest of the petitioners. This latter motion would have entitled the parties to introduce evidence by affidavit or otherwise, as the court might suggest, touching the existence of those facts. It is not made to appear at all from the judgment-roll as brought up by appellants that they sought to raise any objection, either as to the competency of the parties petitioning, or the existence of facts showing a beneficial interest as alleged in the petition. Respondents have presented, by way of diminution of the record, a copy of their petition, also a bill of exceptions which shows that in fact the appellants here did demur and move to quash the writ issued, which latter motion was submitted on the pleadings and record. We are not inclined to consider this supplemental transcript for the reason that the appellants have chosen to present their appeal upon the papers and record first mentioned herein as being that record designated in section 1077 of the Code of Civil Procedure. We think that the appeal should be decided upon that record, which brings us to the merits of the proceeding and leaves for determination the one question as to whether the resolution of the common council of the city of San Diego awarding a liquor license to Green was effective or void. Briefly stated, the facts appearing by the amended return made to the writ show that by ordinance of the city of San Diego it was made unlawful for any person to engage in

retailing intoxicating liquors outside of a certain designated portion of the city. This ordinance was numbered 1434. On the twenty-fifth day of May, 1914, the common council adopted an ordinance repealing ordinance No. 1434, and on the seventeenth day of June following passed a resolution granting to Green a license to engage in the retail liquor business. The repealing ordinance carried a clause making it immediately effective as an urgency measure.

The charter of the city of San Diego provides that no ordinance shall become effective until thirty days have elapsed from the date of its passage, unless the occasion is certified as being one of urgency for the immediate preservation of the public peace, health, and safety. In that charter it is also provided that the right to the referendum may be invoked during the thirty days immediately following the adoption of any ordinance. A referendum petition was filed as against the ordinance of repeal and checked by the clerk and found to contain the requisite number of signatures. It was filed within the period of time limited by the charter. That the filing of this referendum petition had the effect of suspending the operation of the ordinance by which the restrictive zone ordinance was sought to be repealed, seems to be conceded. We do not find it argued on behalf of appellants that the mere fiat of the council expressed in the repealing ordinance to the effect that the public health and safety demanded that the repealing ordinance should take immediate effect, is of any force or virtue whatsoever. It has been held otherwise. (*In re Hoffman*, 155 Cal. 114, [132 Am. St. Rep. 75, 99 Pac. 517].) The subject matter affected by the ordinance was not one suggesting the propriety of the use of the emergency provision. It is claimed that the case presented was not a proper one for *certiorari*, because the action of the council which was sought to be remedied was not judicial in its nature. Primarily, of course, a city council, board of supervisors, or like body, exercises ministerial and legislative functions. Quite generally and almost invariably added to these duties is the requirement that judicial or *quasi*-judicial functions shall be called in to exercise, and generally it may be said that wherever discretionary judgment depends for its guidance upon evidence to be heard that judgment will be judicial in its nature. (*Great Western Power Co. v. Board of Supervisors*, 21 Cal. App. 146, [131 Pac. 88]; *Grumbach v. Leland*, 154

Cal. 679, [98 Pac. 1059].) Under the ordinance of the city of San Diego the city council was required to examine applications for liquor licenses, and, as the ordinance in its language states, "upon the presentation of such application . . . said common council shall fully investigate the question of whether the person making such application is a sober, suitable, or proper person to carry on and conduct the business for which he requests a license, and whether the place described in said application is a proper or suitable place for such business, and conforms to the requirements of this ordinance. . . ."

It is further contended that irrespective of whether the repealing ordinance has been suspended in its effect, the restrictive zone ordinance was effectually repealed by the general ordinance passed subsequent to the date of the adoption of the former and which is known as ordinance No. 2341. The ordinance which has been called the "zone" ordinance was one which by an inspection of its contents appears to have been adopted for the direct purpose of marking out the boundaries of the zone outside of which there should be no retail liquor establishments allowed. Ordinance No. 2341, in its original and amended form, was an ordinance which in its plain import was designed to regulate the granting of licenses within the zone where liquor-dealing establishments were permitted. We find no words therein contained which seem appropriate as words intended to repeal the zone ordinance, and we apply the rule of statutory construction, to wit, that a repeal by implication is not to be favored. As to whether the boundary lines fixed by the zone ordinance were fixed in such a way as to discriminate between properties upon the same street, we think is not here a question for debate. In the map attached to the return, illustrating the boundaries of the zone district, it does appear that portions of blocks have been included on the same street and other portions left out. In the absence of a contrary showing, it must be presumed that conditions existed which warranted the legislative body in fixing the boundaries of the restricted district in the way that they did. With the zone ordinance in effect, the council had no authority to license any person to conduct a retail liquor business in violation thereof, and an attempt to do this would make the act amount to an excess of jurisdiction within the control of a *certiorari* proceeding. *Great Western Power*

*Co. v. Board of Supervisors*, 21 Cal. App. 146, [131 Pac. 88], is in point.

The judgment appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 7, 1916.

---

[Civ. No. 1756. First Appellate District.—March 10, 1916.]

**SAMUEL E. MANNING, Appellant, v. BROADMOOR  
IMPROVEMENT COMPANY, Respondent.**

**BUILDING CONTRACT—AGREEMENT FOR BONUS—BREACH OF CONTRACT.—**

Where plaintiff and defendant entered into a contract whereby the latter sold the former certain lots in a subdivision of land, and agreed to give plaintiff a bonus in a certain amount if the latter would build on each lot a dwelling of a certain cost, according to certain plans, prosecute the work with diligence, and see that no mechanics' liens were filed against the property, plaintiff cannot recover the balance alleged to be due on the bonus, where the evidence shows that the buildings were not completed in the contract time, nor the property kept free from liens, and there were substantial defects in the buildings, to which plaintiff's attention was called and which were not remedied.

**APPEAL** from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

W. B. Rinehart, for Appellant.

H. L. Breed, for Respondent.

**THE COURT.**—This is an appeal from a judgment entered in favor of the defendant and against plaintiff.

The sole question in the case is, Does the evidence sustain the findings?

The defendant, desiring to promote the sale of a suburban tract of land divided into building lots, known as Broadmoor,

in Alameda County, sold to the plaintiff six lots for the aggregate sum of \$11,205, and at the same time entered into an agreement with him, whereby the defendant was to give to the plaintiff a bonus of six thousand dollars upon condition that the latter should build on each of the six lots a dwelling-house, to cost two thousand five hundred dollars, according to plans and specifications to be approved by the defendant; that the work should be prosecuted with due diligence, and no mechanics' liens to be filed against the property.

Of the six thousand dollars bonus all has been paid but the sum of \$449.07, and the purpose of this action is to recover that sum. Five of the buildings were completed, and the reason the defendant refused to pay the balance of the bonus was, as he claimed, that the sixth building was left uncompleted.

We agree with the position taken by the defendant. The buildings were not completed within the time specified in the contract, nor did the plaintiff, as agreed, keep the property free from liens of laborers and materialmen. But aside from those matters, and so far as the last house is concerned, it appears that the plaintiff, notwithstanding that his attention had been called to certain defects in that building, and that he had promised to remedy them, failed to do so in the following particulars: By omitting to put an ash-gate on the outside of the chimney; to repair certain back windows; to construct gutters on the roof and two sides of the house; to install doors to a china closet, and to put in place certain electric fixtures. These things were not done promptly or at all. The plaintiff admitted that the house was unfinished in the respects mentioned, and, as before stated, promised to complete the building and obviate the objections, whereupon, according to the testimony, the defendant expressed himself as willing to pay the balance of the bonus, notwithstanding that the contract was violated in other respects. It also appears from the testimony that the defects were important and substantial, having regard to the purpose of the defendant in entering into the contract.

Under the state of the evidence outlined we do not think it can be said that it fails to support the findings.

The judgment is affirmed.

[Civ. No. 1521. Third Appellate District.—March 10, 1916.]

THE PEOPLE, etc., ex rel. CAMILLUS R. SMITH, Respondent, v. H. L. GUNN, Appellant.

**PUBLIC OFFICERS—SEPARATION OF DUTIES OF CONSOLIDATED OFFICES—DECLARATION OF VACANCY AND APPOINTMENT—POWER OF BOARD OF SUPERVISORS.**—A board of supervisors has no power, under section 4018 of the Political Code, which provides that where the duties of two offices have been consolidated, the board may by ordinance "elect to separate the duties so consolidated . . . without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will be best subserved thereby," after separating the duties of the office of county auditor and county recorder, to declare the office of auditor vacant and then proceed to fill it.

**ID.—VACANCIES IN OFFICE—POWER TO FILL—CONSTRUCTION OF CODE.**—The power of a board of supervisors is limited to the filling of vacancies, and an office becomes vacant only upon the happening of any of the events enumerated in section 996 of the Political Code, and the separation of the duties of two offices is not a "removal from office" within the meaning of subdivision four of such section.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Percy S. King, and Clarence N. Riggins, for Appellant.

U. S. Webb, Attorney-General, and Frank M. Silva, for Respondent.

CHIPMAN, P. J.—Action in *quo warranto* involving the office of auditor of the county of Napa. The board of supervisors of said county, on January 5, 1885, duly passed ordinance No. 9, section 1 of which was as follows:

"Section 1. The duties of the offices of auditor and recorder of Napa county are hereby consolidated, and the person elected to fill such offices must discharge all the duties pertaining to both such offices."

The court found that ordinance No. 9 "is still in full force and effect, except in the particulars hereinafter stated." It is then found that, on November 10, 1915, the said board duly passed ordinance No. 91, as follows:

"Section 1. It appearing to this board that the public interest will be best subserved thereby, this board does hereby elect to separate the duties of the office of auditor from the duties of the office of recorder, heretofore consolidated, without reconsolidation.

"Section 2. This board having elected to separate the duties of said offices, heretofore consolidated, without reconsolidation, the duties of the office of auditor and the duties of the office of recorder shall hereafter be performed by a separate person.

"Section 3. The incumbent, in the said consolidated office of auditor and recorder, shall continue to fill the office and perform the duties of the office of recorder, and the office of auditor shall be filled by appointment by this board on and after this ordinance shall take effect.

"Section 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"This ordinance shall take effect and be in force 30 days after its final passage."

The court also found that, since December 10, 1915, ordinance No. 91 "has been and still is in full force and effect." The court made the following findings:

"V. That section 3 of said ordinance No. 91 provides as follows: 'The incumbent, in the said consolidated office of auditor and recorder, shall continue to fill the office and perform the duties of the office of recorder, and the office of auditor shall be filled by appointment by this board on and after this ordinance shall take effect.'

"VI. That thereafter, to wit, on or about the 21st day of December, A. D. 1915, the said board of supervisors by a resolution duly and regularly passed at a regular meeting of said board of supervisors, declared that a vacancy then and there existed in the said office of auditor of the county of Napa, in said state of California, which said resolution is in the words and figures following, to wit:

" 'Whereas, this board of supervisors has heretofore passed and adopted an ordinance separating the office of auditor from the office of county recorder,

" 'And whereas, said ordinance is now in force and effect

" 'Be it resolved the board adjudge and determine that a vacancy does by reason of such separation now exist in the office of auditor.'

"VII. That after the passage of said resolution declaring a vacancy in the office of auditor of Napa county as aforesaid, and on said 21st day of December, 1915, the said board of supervisors of Napa county duly and regularly appointed the plaintiff, Camillus R. Smith, auditor of said Napa county."

It is then found that the said Smith, on or about December 29, 1915, duly qualified as said auditor, reciting the steps taken to effect such qualification; that, on or about January 3, 1916, the said Smith "demanded in writing of the said Gunn that he deliver over to him the said Camillus R. Smith, the said office of auditor," the books, documents, records, etc., pertaining to said office of auditor, which the said Gunn refused to do and "the said H. L. Gunn did then and there and thereupon usurp, intrude into and unlawfully hold and exercise said public office of auditor . . . against the said Camillus R. Smith, the duly appointed and qualified auditor of said Napa county as aforesaid"; that, prior to January 3, 1916, defendant did not usurp or intrude into or unlawfully hold or exercise the public office of auditor of said county. Finding XII is as follows:

"That at the general election held throughout the state of California on the 3rd day of November, 1914, H. L. Gunn, the defendant herein, was duly and regularly elected to the offices of recorder and auditor of the county of Napa, state of California. That he duly and regularly qualified as such and entered upon the performance of the duties of said offices, and continued to lawfully exercise the same until said 3rd day of January, 1916, as aforesaid."

As conclusions of law the court found that defendant Gunn "was not on January 3, 1916, and has not at any time been since, and is not now, entitled to hold or exercise or perform the duties of the office of auditor of the county of Napa . . . and that on said 3rd day of January, 1916, he usurped and intruded into the same . . . and that said defendant H. L. Gunn should be immediately excluded from said office . . . and that said plaintiff Camillus R. Smith was and now is the duly appointed and qualified auditor of said county of Napa, on the 3rd day of January, 1916, and ever since has been and now is entitled to the possession of said office."

Judgment was accordingly entered from which defendant appeals.

The action taken by the supervisors in passing ordinance 91 was under section 4018 of the Political Code, which provides that where the duties of two offices have been consolidated, the board may by ordinance "elect to separate the duties so consolidated . . . without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will best be subserved thereby." The facts as found by the court show that the consolidation of the offices of auditor and recorder occurred some years prior to the passage of ordinance 91, and that when this ordinance was enacted the defendant was the duly elected, qualified, and acting auditor and recorder, having been chosen by the votes of the electors at the general election in November, 1914.

That the county auditor and recorder are elective officers, made so by the legislature, is not disputed. Section 5, article XI, of the constitution provides that "the legislature by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys and such other county officers . . . as public convenience may require," etc. Section 4, article XX, is as follows: "All officers or commissioners whose election or appointment is not provided for by this constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct." In a certain sense, the officers referred to in section 5, article XI, or officers other than those whose election or appointment is not provided by the constitution, referred to in section 4, article XX, are not usually called constitutional officers. But they are created by authority of the constitution, and except that their election or appointment is not specifically provided for by the constitution, are as much constitutional officers as are those thus provided for. The one class must look to the constitution for the mode of their election or appointment, while the other class must look to the provisions made by the legislature under the authority of the constitution. The class of county officers to which the county auditor belongs is composed of officers who are by the legislature made elective.

Section 4021 of the Political Code provides that "all elective county and township officers, except otherwise provided for in this title and by law, shall be elected at the general election at

which the governor is elected. . . . All officers elected under the provisions of this title shall hold office until their successors are elected or appointed and qualified. . . . " Among the county officers so classified by section 4013 some are made elective by act of the legislature and others, for example, fish and game warden, are appointed by the supervisors; section 4149b; fish and game commissioners—the governor appoints; section 344; livestock inspectors—supervisors appoint; section 4149.

But respondent contends that section 4018 of the Political Code confers authority upon the board to separate the duties of auditor and recorder and to provide that the duties of each office shall be performed by a separate person and that, having taken such action, a vacancy necessarily occurred which the board may fill under subdivision 19, section 4041, of the Political Code. This section empowers the board to fill by appointment all vacancies that may occur in any county office except the offices of judge and supervisor. In short, the contention is that the board may create the vacancy and then proceed to fill it. This contention, it seems to us, is not maintainable. Section 996 of the Political Code provides how vacancies may occur. None of the nine enumerated "events," upon the happening of which before the expiration of the term will cause a vacancy, can be said to apply to the case here. Respondent calls attention to the fourth subdivision which says that a vacancy occurs, referring to an incumbent, "upon his removal from office," and asks, "Has not appellant been 'removed from office,' as provided by the legislature?" Unhesitatingly we answer that the separation of the duties of auditor and recorder, as provided for in section 4018, is not in any sense a "removal from office" as contemplated by section 996. In *Rosborough v. Boardman*, 67 Cal. 116, [7 Pac. 261], it was held that the power of the supervisors to appoint petitioner depended upon there being a vacancy, and an office becomes vacant only upon the happening of any of the events enumerated in section 996 of the Political Code, among which the event relied on in that case is not mentioned. In *People v. Ward*, 107 Cal. 236, [40 Pac. 538], the court pointed out that the rule in the *Rosborough* case could not be safely applied in all cases for the legislature, as was shown, had added to the list of "events" which would work a vacancy. (*People v. Ward*, 107 Cal. 241, [40 Pac. 538].) But there is nothing

said in that case to justify respondent's claim that section 4018 furnishes such an "event." The court said, in *People v. Ward*: "The power of the supervisors is limited to the filling of vacancies. That power could be exercised solely upon an existing vacancy. The board could not by its action create a vacancy, nor by anticipation fill one, which was to arise in *futuro* during the term of its successor."

One may ask why and upon what authority the board elected to declare the office of auditor to be vacant and not that of recorder? The board may separate the duties of the two officers but the offices remain undisturbed. The office of recorder still existed and there was an incumbent chosen, as the legislature had provided—by the electors at a general election. There is certainly no express authority given in section 4018 to appoint an auditor and none to treat the office as vacant, and we do not think that any such authority can be held to have been given by implication.

*People on the Relation of Rynerson v. Kelsey*, 34 Cal. 470, was a case in *quo warranto*. At that time the constitution required that assessors and collectors of town, county, and state taxes, shall be elected, etc. Rynerson was elected sheriff of San Joaquin County, September 6, 1865, and duly qualified as such sheriff. The statute devolved upon the sheriff the duties of tax collector of the county. He duly qualified as such collector and entered upon his duties as sheriff and *ex-officio* tax collector. Kelsey was elected county treasurer at the same election. Subsequently, April 2, 1866, the legislature passed an act making the county treasurer *ex-officio* tax collector to take effect from and after the first Monday in March, 1867. Pursuant to the act, Kelsey, as county treasurer, entered upon the duties of tax collector, excluding the sheriff therefrom. It was held that "the legislature might repeal the law devolving the duties of tax collector upon the sheriff, and thereby deprive the sheriff of the right to perform the duties of tax collector, provided such repeal does not, in effect, abolish the office of tax collector, but it does not follow that the legislature has the power of conferring the duties of tax collector on any of the county officers or person not elected to the office by the electors of the county." The court said: "Unquestionably the legislature may by law provide that the county treasurer, sheriff or any other county officer shall perform the duties of tax collector; but the law devolving such

*ex-officio* duty upon any county officer must precede the election of such officer, so that the electors of the county may have an opportunity under the law of selecting the person or officer charged with the duties of tax collector. . . . It is not pretended that a vacancy had occurred in the office of tax collector, nor that such vacancy had been in any legal manner declared on the first Monday of March, 1867, the day on which said statute by its terms took effect, and respondent entered upon the duties of tax collector and excluded appellant therefrom. The statute was not enacted for the purpose of filling a vacancy in the office of tax collector actually existing or prospective. Its design is to make the treasurer of San Joaquin County *ex-officio* tax collector instead of the sheriff. This the legislature could not accomplish until after the treasurer had been elected, under the law, by the qualified electors of the county." Cited in *Mills v. Sargent*, 36 Cal. 382, holding the act operative as to future elections. Cited, also, to the effect that an officer may be deprived of *ex-officio* position as tax collector, but not during his term, in *Swinnerton v. Monterey County*, 76 Cal. 113, 116, [18 Pac. 135]. (See, also, *People v. Wells*, 2 Cal. 198; *Christy v. Board of Supervisors*, 39 Cal. 3.)

Respondent claims that the case of *People v. Kelsey*, and other cases cited by appellant were not applicable "because, under the constitution of 1849, the office of tax collector was a constitutional office, and the constitution provided that a tax collector should be elected by the people." The present constitution makes the auditor elective or appointive as the legislature may direct and the legislature has directed that it be elective. Having thus conferred the power upon the legislature to provide the mode of choosing that officer, and the legislature having acted, the mode so provided and so determined by the legislature becomes for the time being the only mode of selection. The principle of the *Kelsey* case, it seems to us, governs here, and while the supervisors were acting within the power given them to separate the duties of auditor and recorder, the board had no authority to appoint some person other than the incumbent, or any person for that matter, to fill that office. Obviously, this must be so, inasmuch as the only mode provided by law to select an auditor is by election by the people.

Section 4017 of the Political Code provides for the consolidation by the supervisors of the duties of several different county officers, to wit: "Sheriff and tax collector; auditor and recorder; county clerk, auditor and recorder; county clerk and recorder; county clerk and auditor; treasurer and tax collector; treasurer and recorder; assessor and tax collector; public administrator and coroner; district attorney and coroner; sheriff and public administrator." Section 4018 authorizes the board to "separate the duties so consolidated." It is easily conceivable that, under the powers here given, if the supervisors can lawfully do what is here attempted, they might make any office of their selection appointive, at least, for the time being, by vacating that office or separating its duties and thus remove the incumbent selected by the people. Thus, the supervisors could separate the duties devolved upon the district attorney and coroner as consolidated, and declare the office of district attorney, filled by the vote of the people, vacant, and appoint a successor.

Of course, it is not to be presumed that a public officer will violate his duty or act in bad faith in its discharge. The supervisors might conscientiously believe, and so act on their belief, that they would best subserve the interests of the people by so separating the duties, or so consolidating them in a given case as to make necessary the appointment of persons of their own selection rather than those chosen by the people. The temptation to do this might be strong and be supported by the best judgment of the supervisors. We do not think the statute should be so construed as to allow either their judgment or temptation to be so far gratified as to allow them to declare a vacancy and fill it by appointment under the guise of subserving the public interest. It is safer and, we think, better that the principle enunciated in the *Kelsey* case, *supra*, should be followed, and the choice of the electors remain undisturbed until they may have an opportunity at the next election to fill the offices in accordance with the separation of duties as declared by the supervisors.

Respondent cites *Kinsey v. Kellogg*, 65 Cal. 111, [3 Pac. 405], as a case "that comes nearer to the case at bar than any other in California." In that case it appeared that by the act of February 28, 1876, it was provided that "the county clerk shall receive for all services required of him as county clerk and *ex-officio* clerk of the district court, probate court,

board of supervisors, board of equalization, auditor and *ex-officio* county recorder, a salary of \$5,000 per annum, which salary shall be in full for all services required of and performed by him." In 1880 Humboldt County passed into class two. Prior to the election of plaintiff as county clerk the supervisors did not consolidate the office of county clerk with those of recorder or auditor, or either of them. But, on July 8, 1882, the board consolidated the offices of recorder and auditor by ordinance duly published before the election in November of that year. At that general election plaintiff was elected clerk and defendant recorder and *ex-officio* auditor of Humboldt County. Plaintiff entered upon the discharge of the duties of county clerk on the first Monday of January, 1883, and defendant commenced to act as recorder and auditor on the eighth day of January, 1883, and so continued to discharge the duties of his office. On February 8, 1883, the board fixed the salary of the clerk at two thousand seven hundred dollars. After he had served one month he demanded of defendant a warrant for the sum of \$416.66 (1-12 of five thousand dollars) for the preceding month, which was refused, and he brought mandate to compel the issuing of the warrant. The lower court refused the writ and plaintiff appealed. In dealing with the situation the supreme court said: "Here, when the act of 1876 was passed, there was a person who was discharging the duties of clerk, recorder, and auditor, and unless subsequent legislation should require otherwise, one person would continue to fill the three separate offices. It was to this condition of things that the law was made applicable, and the compensation provided by it was provided as compensation to the clerk, the recorder, and the auditor. The law did not determine how much should be paid to each of the three officers—a matter of no consequence so long as the three offices were in one man. But when the organization of the county government was changed, and the person who was clerk was not auditor nor recorder, it is clear that no one of the three officers was entitled to receive the compensation intended for the three; and as the act of 1876 did not provide for the event, the act, by force of its own expressions, became inoperative when the event occurred. As there was no operative law fixing the compensation of the county clerk after Humboldt became organized as a county of the second class, the board of supervisors had authority to fix the compensation

of that officer. (Pol. Code, sec. 4046, subd. 18.) Judgment affirmed."

It will at once be seen that the power exercised by the supervisors in the present case was not involved in the Humboldt County case. There the clerk and the auditor and recorder each was elected after the passage of the ordinance, and each continued to discharge the duties of the office to which he was elected. The act of 1876 was no longer operative, and the court very properly held that the supervisors could fix the salary of the clerk, the only question involved.

Our conclusion is that the learned trial court was in error in its view of the statute.

The judgment is reversed.

Burnett, J., and Hart, J., concurred.

---

[Civ. No. 1637. First Appellate District.—March 11, 1916.]

**WALTER R. WELCH, Respondent, v. COUNTY OF SANTA CRUZ, Appellant.**

**PLEADING — JURISDICTION — DEMAND IN COMPLAINT DETERMINES.**—The demand set forth in the complaint determines the jurisdiction of the superior court in actions at law seeking a money judgment; and the fact that the demand is made up in part of items which may prove not to be recoverable will not make the complaint subject to demurrer upon that ground.

**CLAIM AGAINST COUNTY — STATUTE OF LIMITATIONS—SECTION 4075, POLITICAL CODE.**—Under section 4075 of the Political Code, the supervisors cannot allow a claim against a county unless it is presented and filed with the clerk of the board within one year after the last item of the account or claim accrued, and where certain items of a claim against a county accrued more than one year prior to the presentation and filing of the account, they are barred, and the fact that one of the items accrued within the year does not revive the stale items.

**APPEAL** from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

George W. Smith, for Appellant.

Charles B. Younger, for Respondent.

KERRIGAN, J.—This is an action instituted for the recovery of the sum of five hundred dollars, which the plaintiff alleges he expended and paid out in the discharge of his official duties as fish and game warden of the defendant, the county of Santa Cruz, for the twenty months from and including June, 1909, to December, 1910, and for the month of April, 1912. The action is based upon a claim for the aggregate of the items covering the whole of the period filed with the board of supervisors of the county by plaintiff on the twenty-seventh day of April, 1912.

The board allowed the claim in a sum of \$25 only. The items constituting the claim were set forth in detail in an exhibit attached to and made a part of the complaint.

Defendant interposed a general and special demurrer to the complaint. One of the grounds of the demurrer is "that the claim or claims set forth in the complaint and the cause of action based thereupon as set forth in the said complaint are barred by the provisions of secs. 4075 and 4076 of the Political Code of California."

The demurrer was overruled by the court, whereupon the defendant answered, and after trial judgment went for the plaintiff in the amount of his demand. The appeal is before us on the judgment-roll alone.

Section 4075 of the Political Code reads as follows:

"The Board of supervisors must not hear or consider any claim in favor of any . . . person, . . . against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized, . . . and is presented and filed with the clerk of the board within a year after the last item of the account or claim accrued."

The first point made by the appellant in support of his appeal is that the demurrer to the complaint should have been sustained for the reason, as contended, that all but \$25 of the sum demanded in the complaint was barred by the provisions of section 4075 of the Political Code above quoted, and consequently the complaint states a cause of action for the sum of \$25 only.

But it is the amount of the demand that determines the jurisdiction of the superior court in actions at law seeking a money judgment; and the fact that the demand is made up in part of items which may prove not to be recoverable will not make the complaint subject to demurrer upon that ground. As was stated in the case of *Nelson v. Merced County*, 122 Cal. 644, [55 Pac. 421], "There being but one cause of action pleaded in the complaint, if a recovery could be had for any part of the claim it (the demurrer to the complaint) should have been overruled."

But, so far as the amount for which the court rendered judgment is concerned, it appears to us that the appellant's contention that the board of supervisors of the county had no jurisdiction to allow any of the items of the plaintiff's claim except those items thereof amounting to the sum of \$25 which accrued in the month of April, 1912, and that accordingly the plaintiff could not recover more, must be sustained. It is true, as pointed out by the respondent, that the last item of the account accrued within one year before it was presented and filed. But, on the other hand, at the time of the accrual of this item more than a year had elapsed since the accrual of the item next preceding it, which is dated December 31, 1910. The plaintiff had until December 31, 1911, in which to present and file with the clerk of the board his demand therefor, and not having done so it was barred together with all earlier items. The fact that fourteen months later he has a new demand against the county will not revive the stale items. We think the analogy between the situation here presented, and that of the application of the statute of limitations to an account current, is quite clear. The rule as to the latter is thus stated in 25 Cyc., p. 1127: "Where the mutual dealings have ceased for the statutory period after the date of the last item, so that during that time there are no items on either side of the account, the whole account is barred; and in such a case subsequent items are unavailing to remove the bar."

The language used by the supreme court in *Nelson v. Merced County*, 122 Cal. 644, [55 Pac. 421], upon this last point, is not applicable to the facts of this case. In that case some of the items of the account were attacked because incurred more than a year before the presentation of the account; and it was held that inasmuch as the last item was



within time the fact that the first item was more than a year old was immaterial; but an examination of that case will disclose that there was not, at any time before the presentation and filing of the claim, a point at which the account was barred. In other words, the interval of time between items was always less than one year. The decision in that case is not therefore authority for the contention of the respondent.

For the reasons stated we think the court erred in giving judgment for any but the last items of the account aggregating \$25; the judgment is therefore modified by striking therefrom the sum of \$475, and as thus modified it will stand affirmed—appellant to recover its costs of this appeal.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 4, 1916.

---

[Civ. No. 1483. Third Appellate District.—March 11, 1916.]

**SAGE LAND AND IMPROVEMENT COMPANY (a Corporation), Appellant, v. HALE McCOWEN et al., Respondents.**

**VENDOR AND PURCHASER—CONTRACT FOR SALE OF SEVERAL PARCELS—**

**FAILURE OF TITLE TO SINGLE PARCEL—NONFORFEITURE OF CONTRACT.**

Under a written contract for the sale and purchase of several tracts of land comprising over one thousand acres which had been segregated into separate parcels, so described in the contract, and an acreage price placed thereon, the vendee cannot decline to purchase a specific parcel on the ground that the title to another parcel had failed, where the contract expressly provides that should the title to any of the described lands fail, it shall not work a forfeiture of the contract, but a deed to any such lands, together with the price, shall be placed in escrow until the title is perfected, provided the same is perfected within twelve months.

**1b. — DEFECTS IN TITLE TO SPECIFIC PARCEL — ESCROW AGREEMENT —**

**EFFECT OF.**—Under the terms of such a contract the vendee cannot complain of alleged defects in the title to a specific parcel, where a suit to quiet title was brought as to such parcel, the title quieted thereto, and a deed thereof placed in escrow, upon the sole and

only condition that it and the price therefor should there remain for the period of one year to provide against the possible contingency of the defendants in such suit, who were served by publication, appearing and opening up their default.

**ID.—DEFECTS IN TITLE—WAIVER.**—Where under a contract of sale it is the duty of a purchaser to point out defects in title, his failure so to do is a waiver of the defects.

**APPEAL** from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Mannon & Mannon, for Appellant.

Robert Duncan, for Respondents.

**BURNETT, J.**—On September 2, 1911, appellant and Louis A. Moody, Fannie T. McCowen, and Hale McCowen, her husband, entered into a written agreement for the sale and purchase of several tracts of land, comprising 1404 acres, appellant agreeing to pay the sum of \$25 per acre; "for all of the above described land, the sum of \$5,000.00 gold coin upon the execution and delivery of this contract, and the balance of \$—— upon the approval and acceptance of a clear and unencumbered title to the above described property and the whole thereof.

"And the said parties of the first part (respondents) agree to furnish to said party of the second part, within ten days from date hereof, complete abstracts of title to said lands and premises above described, and the said party of the second part shall have thirty days after the receipt of said abstract in which to examine the same and report defects, and should any defects be found in the title to said land, or any part thereof, parties of the first part will clear such defects within a reasonable time not exceeding six months, and this contract shall remain in full force and effect.

"It is further understood and agreed that should parties of the first part refuse or neglect to clear such defects within the time above specified, then and in that case, party of the second part will be under no obligation in law or equity to purchase said premises, and all moneys paid thereunder shall

be returned to the said party of the second part with interest thereon at the rate of 6 per cent per annum. . . .

*"It is further understood and agreed, that should the title to any of the above described lands fail, it shall not work a forfeiture of this contract, but a deed properly executed by the parties of the first part, to the party of the second part, for all the lands to which the title shall have failed, together with the sum of \$25.00 per acre for such land, shall be placed in the Commercial Bank of Ukiah, at Ukiah, California, to remain there until the title to said lands shall have been perfected and the title acceptable to party of the second part, but it is understood and agreed that the said title shall be perfected within a reasonable time after said deed and said money is placed in escrow, not exceeding twelve months."*

We have italicized the portion of said agreement which is peculiar and which has given rise to some controversy here. The contract was executed for the company by its duly authorized agent, D. P. Simons, and Mr. Simons employed as his attorneys in connection with the contract, Messrs. Preston & Preston of Ukiah.

Abstracts of title to the lands described in said agreement were furnished by the vendors to Messrs. Preston & Preston, representing the said corporation, and, previous to March 2, 1912, the attorneys had approved the title to all the lands described in the contract with the exception of 633.37 acres consisting of two separate tracts, one containing 313.37 acres, designated hereinafter as "scrip land," and the other 320 acres, as the "tax title land." Mr. Simons, on behalf of the appellant, paid Preston & Preston five thousand dollars, which was in due time paid over to the vendors on the execution of the contract, and, on September 21, 1911, he also sent to J. W. Preston, Esq., sufficient funds to pay for all of the lands to which title had been approved. Thereafter the vendors conveyed to appellant all of the said lands except the said 633.37 acres and Mr. Preston paid them therefor at the rate of \$25 per acre. Two separate deeds were made and placed in the bank in escrow, one for said "scrip land" and the other for the "tax title land." There is no controversy as to the former, it being admitted that respondents had no title thereto. No defects in said tax title were pointed out by appellant but its attorneys, said Preston & Preston, requested that a suit to quiet title against the possible claim of one Mary

G. Andenried be brought for the reason that the title was, in part, at least, based on a tax deed. The vendors complied with this request and employed said attorneys for appellant to bring said action. After this was accomplished said attorneys again requested the vendors to wait for a year to elapse to provide against the contingency of Mary G. Andenried appearing in the suit and asking that the proceedings be opened up, as the summons had been served by publication and judgment was taken by default. The vendors agreed to this, and said deeds were placed in escrow as aforesaid with the sum of \$15,834.25 in cash, and a written agreement signed by Hale McCowen, Jr., as attorney for L. A. Moody and Hale McCowen and Preston & Preston as attorneys for appellant, executed May 2, 1912. This agreement referred to the said contract of September 2, 1911, and especially the provision which we have hereinbefore italicized and provided that said deeds and money "are to be held subject to the following terms:

"I. The deeds are, or either of them is, to be delivered to The Sage Land and Improvement Company, upon demand at any time within twelve months from the date thereof;

"II. Upon the delivery of each deed to The Sage Land and Improvement Company, the amount of money due under the deed so delivered by the provision hereinabove set forth is to be delivered to L. A. Moody, Fannie T. McCowen and Hale McCowen, her husband;

"III. If at the end of twelve months from the date hereof the deeds are, or either of them is, still in the possession of the depository they are, or it is, to be returned to the depositors, and money remaining unpaid is to be returned to The Sage Land and Improvement Company." Then follows a description of each of the two said tracts.

In August, 1912, Mr. Simons was succeeded by one E. J. James as agent for appellant, and, on March 3, 1913, as such agent, he demanded of the bank the return of said \$15,834.25, claiming that the title to said lands had not been perfected and rendered acceptable to appellant within the twelve months. On the 3d or 4th of said month Preston & Preston, acting for the vendors, demanded of the bank eight thousand dollars of said money, claiming that the escrow condition as to said tax title land had been complied with and that respondents were therefore entitled to said sum. The

bank refused to pay over any of said money, and plaintiff thereupon brought the action against said bank for the entire sum and, upon proper proceedings, the said depository paid the money into court and was discharged from further liability, the vendors being substituted as parties defendant. After trial the court found in accordance with the position of the vendors, and held that they were entitled to said eight thousand dollars with interest. The appeal is from said judgment and from an order denying a motion for a new trial.

The first contention of appellant is "that, in view of the conceded fact that the title to the 'scrip land' is invalid, and assuming that the title to the 'tax title land' is good and marketable, still, under the terms of its contract, this appellant was entitled to both the 'scrip land' and the 'tax title land' or it was not bound to take any thereof and that, therefore, the decision of the superior court compelling it to take and pay for the 'tax title land' is erroneous as a matter of law."

We cannot so read the contract of the parties. They expressly provided that "should title to any of the above described lands fail it shall not work a forfeiture of this contract." It must be remembered that the land had been segregated into separate parcels and so described in said contract and the price was placed at \$25 per acre. "The above described lands" refers, of course, to all the lands that were contemplated by said agreement and described therein. It seems to us that more accurate language could hardly have been selected to express an agreement that the several parcels should be treated separately, and that if the title to any should fail, it would not affect the contract as to those parcels impressed with a good title. In view of a previous provision in the contract to the effect that if the parties owning the lands should neglect or refuse to clear defects within a certain time, the party purchasing the lands should not be required to purchase said premises, and that any money paid therefor should be returned, it is possible that the purchaser might have declined to purchase at all if there was not a good title to all of the land, but surely it was not contemplated that the purchaser might take certain tracts having a good title and reject others. If such was the intention, it must be admitted that the parties were very unfortunate in the selection of terms to express such intention.

There would seem to be even less room for doubt as to the said agreement of March 2, 1912. Therein it is provided that certain deeds are, or either of them is, to be delivered to the Sage Land and Improvement Company, and upon the delivery of each deed the amount of money due under said deed is to be paid over and, if at the end of the year, either of said deeds remains in the possession of the depository, it is to be returned to the grantors and the corresponding amount returned to appellant. This language cannot be interpreted so as to tie the two parcels together. The natural construction, as we view it, is that in case of title to either, that parcel should be paid for on delivery of the deed. The parties undoubtedly so understood the agreement and so construed it. As evidence of this we may refer to the testimony of Mr. Simons, the accredited representative of appellant, in which he declared that he thought at that time that he would have to take the tax title. "This land, the tax title piece, is light timber and the scrip piece is heavier and this question as to whether I would be obliged to take the light piece and not get the better timber did not arise until the question of these titles came up. It was understood at the time of the deposit that if the tax title piece was made good within the year and the scripped was not, that I would have to take the tax title piece." Of course, they expected both pieces to be clear at the end of the year and appellant preferred the scrip land, naturally, as there was better timber thereon, but there was willingness to take the chance of getting a good title to either or both.

We conclude that appellant's first point is not well taken.

The second is that respondents did not furnish a marketable title to said "tax title land." But, precedent to any consideration of the declared defects in said title, we should regard the finding of the trial court: "That the said deed to said 320-acre tract of land, the title to which was quieted as aforesaid and the said sum of eight thousand dollars in cash, being twenty-five dollars an acre therefor, were placed in said Commercial Bank of Ukiah, the 2nd day of March, A. D. 1912, upon the sole and only condition that they should remain there for the period of one year so that the time for appearance of any of the defendants in said suits to quiet title should expire and that no one should appear in said actions during said time; that upon the expiration of said time, if no appearance

was made, that the deed to said 320-acre tract should be delivered to the plaintiff in this action and the said sum of money, to wit, eight thousand dollars, should be delivered and paid to the said parties of the first part in said contract, but if any of said defendants should appear in said action during said time, then and in that event the money should be returned to the plaintiff and the said deed to the parties of the first part in said contract." It is further found that no one so appeared within the year, and this is not disputed. The situation is, therefore, that if said finding quoted as above is, with its necessary implications, supported by competent evidence, the question as to any actual defects in said title becomes immaterial and said finding, in connection with admitted facts, is sufficient to warrant the judgment in the case.

Said finding would seem to be supported by the following testimony of Mr. Simons: "It is a fact that when this money and those deeds were placed in the Commercial Bank of Ukiah that the deed to the tax title lands was placed there upon the sole and only condition that if Mrs. Andenried appeared within the year that I was not to take the lands, and if she did not appear within a year that I was to take the piece of land if that title would be perfected. . . . I understood that the title would not be perfected—would not be perfected for one year."

H. L. Preston testified that he was a member of the law firm of Preston & Preston, and that they were employed to pass on all titles for the lands purchased by him for the Sage Land and Improvement Company; that he drew said contract of February 2, 1911, and afterward Mr. Simons went away and left it with said firm "and Mr. McCowen delivered his abstracts . . . and I would take them up and examine them and render a report on them to Mr. Simons and I give Mr. McCowen a copy of the report and then if there were any defects in them we had them cured, such as getting quitclaim deeds and patents and when the title to one piece was cured why we paid for it and took the deed to the Sage Land and Improvement Company and recorded the deed and had the abstract brought down to date to that piece and put our opinion in the report and then I sent them to Mr. Simons; he left the money with us and intended as often as we approved a title to take it and pay for it." He furthermore testified that he never found and pointed out to any of the respondents

any defect in the title to this "tax title land" and that the suit to quiet title was "just an extraordinary precaution because the Sages were nonresidents of California and they were so particular about everything we thought as a double precaution we would have the title quieted. I told Mr. McCowen I thought it would be better to have the suits brought and he said that it was all right to go ahead and have it done. So he said he would like for Hale McCowen, Jr., to attend to the business and we told him it was all right, we would oversee it and help him and I communicated to Simons and he said that it was all right for us to attend to it, and the proceedings which have been introduced in evidence here were taken as a result of that." He testified, furthermore, that after the decree was rendered he talked the matter over with Mr. McCowen, and told him that since service was had by publication he ought to wait for twelve months for the money to give the parties an opportunity to appear, and that McCowen objected, but finally consented, and it was decided "to put it up in the bank according to the contract and wait the twelve months and they both agreed to it. The next day after the decrees were entered we drew this deed to the tax title and these two deeds and money were put in the bank" with the said written agreement of March 2, 1912. "We talked to Mr. Simons about the matter of this escrow with regard to the tax title and had correspondence about it before our talk with Mr. McCowen, about the 29th day of January, 1912, and talked about it then; it was understood that afternoon or day before, we talked about it over the phone. We had previously discussed that agreement with Mr. Simons and Mr. McCowen and told Mr. Simons what it was to be. . . . We already accepted the title to the tax title and all we were doing was to insure that this woman would not appear within the year, that was the only condition. Never dreamed until Mr. James came here but what we would have to take each piece as the title was perfected and I told Mr. James that when he came here. . . . When this suit to quiet title business came up why we explained it to Mr. McCowen and also to Mr. Simons and it was agreed between us that Hale McCowen, Jr., was to do the work and we were to oversee it."

There is other evidence clearly related to the point before us, but sufficient has been quoted to show, as we believe, that such was the agreement, as found by the court, when the said

deeds and money were deposited in escrow, and, also, that Preston & Preston were authorized as the agents of appellant to make such agreement and, moreover, that, through Mr. Simons, appellant was fully informed of the whole transaction, made no objection whatever, but on the contrary, agreed to and ratified the same.

There was no concealment, no misrepresentation, no fraud whatever. In fact, there is no such claim and we are at a loss to understand how it could be held that said finding is entirely unsupported.

While the foregoing testimony was being taken objections to certain questions were overruled by the court, but we deem specific notice thereof unnecessary, as the evidence admitted without objection is equivalent to what we have set forth.

Another circumstance of moment, apart from the said supplemental agreement of March 2, 1912, appearing from what we have quoted, is that under the contract it was the duty of appellant to point out any defects in the title if any existed. Nothing of the kind was done. In fact, the contrary was conceded by its attorneys. It would seem, therefore, that the defects, if any existed, were waived.

In *Easton v. Montgomery*, 90 Cal. 307, 313, [25 Am. St. Rep. 123, 27 Pac. 280], after holding that it was the duty of the vendee to examine the title, the supreme court said: "If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objection, a reasonable time would be allowed therefor. The burden is on the vendee to point out the defects in the title. (*Dwight v. Cutler*, 3 Mich. 566, [64 Am. Dec. 105].)"

As to the other proposition, concerning the sufficiency of the proceedings culminating in the sale of said property for delinquent taxes, and the validity of the deeds executed in pursuance thereof, it is unnecessary to inquire specifically if we are right in the conclusion as to said contract of March 2, 1912, although we may say that the various objections urged by appellant to said tax title appear to be satisfactorily answered in the argument of respondents. Likewise, the point made that the trial court abused its discretion in refusing to open up the case after it had been submitted, in order that

appellant might offer the assessment rolls in evidence for the purpose of showing that they did not have attached thereto the affidavits of the assessor and clerk of the board of supervisors as required by the statute, becomes unimportant but as to that, in view of the counter-affidavits and the opportunity which appellant had previously to discover the facts, we think it cannot be said there was any abuse of discretion.

As we understand the record, we think the judgment and order should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 10, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 8, 1916.

---

[Crim. No. 831. Third Appellate District.—March 11, 1916.]

THE PEOPLE, Respondent, v. ALBERT E. FISHER,  
Appellant.

**CRIMINAL LAW—KIDNAPING FOR PURPOSES OF EXTORTION OR ROBBERY—**

**INTENT—EVIDENCE.**—In a prosecution under section 209 of the Penal Code for maliciously, forcibly, or fraudulently taking or enticing away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, the intent with which such an unlawful act is performed, or the ultimate object which the actor has in view, may be shown by circumstances.

**Id.—CONSUMMATION OF PURPOSE UNNECESSARY.**—In the commission of such a crime it is not necessary for the purpose charged in the information to be accomplished in order to make it effectual as an element of the crime; all that is required is that some overt act be done toward the execution of the purpose and the fulfillment of the intent.

**Id.—INSTRUCTION—AIDING OR ABETTING OF CRIME.**—An instruction in a prosecution for such a crime, that all persons concerned in the commission of the crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or, not being

present, have advised and encouraged its commission, are principals in any crime so committed, is not prejudicially erroneous, where the jury is also instructed that they must acquit the defendant unless they believe beyond a reasonable doubt and to a moral certainty that he had the intent and purpose to extort from, or rob, the complaining witness, or to exact money or lands from his relatives or friends.

**APPEAL from a judgment of the Superior Court of Merced County, and from an order denying a new trial. J. J. Trabucco, Judge presiding.**

The facts are stated in the opinion of the court.

**Ben Berry, and L. J. Schino, for Appellant.**

**U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.**

**BURNETT, J.**—This case, as set forth in the transcript, reveals a strange story. It reads as though it were a tale of medieval brigandage. Defendant and one F. W. Kirkman, riding in an automobile on the morning of May 26, 1915, near the city of Merced, saw approaching in a buggy F. W. Henderson, a prominent attorney of said city, who was on his way from his home in the country to his office in Merced. Appellant and Kirkman, alighting from the machine, approached the head of the horse that he was driving and, both pointing pistols at Henderson's head, demanded that he get out or they would kill him. He was then compelled to get into the automobile which contained two seats and had side curtains. He was then required to write a note to his stenographer giving an account of his absence. Kirkman and Fisher then handcuffed him to an iron rail attached to the seat of the automobile. Fisher then drove Henderson's horse and buggy into Merced and delivered said note to the stenographer and, thereafter, he walked to the outskirts of the city and rejoined the occupants of the automobile. From this point the machine was driven along the public highway until the city of Stockton was reached and, while making a turn from one street to another, Henderson managed to get the door open and he jumped headlong out, Fisher ineffectually attempting to grab him. Kirkman was driving and temporarily lost control of the car, with the result

that it collided with an iron lighting post and was brought to a standstill. Kirkman and Fisher took flight and the former has not been apprehended. Fisher was arrested in Los Angeles and convicted in the superior court of Merced County upon an information charging that he "did willfully, unlawfully, feloniously, maliciously, forcibly and fraudulently take, entice and carry away one F. W. Henderson, with the intent then and there to restrain said F. W. Henderson, and thereby to commit extortion and robbery from said F. W. Henderson, and to exact from the relatives of said F. W. Henderson, money, lands, promissory notes, deeds, real property, personal property, and other valuable things."

It is not disputed that therein is properly set forth the offense contemplated by section 209 of the Penal Code, nor is it claimed that the evidence is insufficient to support the offense of kidnaping, but the main contention of appellant is that there is a failure of proof as to the intent charged in said information. With this contention we do not agree. Manifestly, the intent with which such an unlawful act is performed, or the ultimate object which the actor has in view, must ordinarily be shown by circumstances. It is not to be supposed that the perpetrators would openly declare the full purport of their nefarious design, although it does appear that they threatened to kill Mr. Henderson if he made an outcry, or attempted to escape.

Mr. Henderson does not say that the conspirators or either of them declared an intention to resort to extortion or robbery, but certain facts related by him and by other witnesses furnish mute but persuasive testimony that such was the intention. At least, from the many circumstances appearing in the record, it cannot be said that the inference drawn by the jury was or is unreasonable. As a striking example of these significant circumstances we may refer to some of the articles that were found in said automobile. There was a telephone apparatus by which telephone connection could be had through the wire running at the side of many of the public roads, also a complete telephone directory of the city of Merced. There were also many promissory notes in favor of Kirkman for large sums of money, needing only the signature of some promisor to make them complete. There was also a complete map of the land owned by Henderson, and a deed containing an exact description of land owned by the mother-

in-law of Henderson, without any signature thereto. To the foregoing we may add the fact that, while Henderson was being taken along the highway as before described, defendant Fisher attempted to induce him to drink some wine which was afterward found to contain chloral, a drug producing sleep. When they passed other machines Henderson was also compelled to hide his handcuffs and himself as much as possible. Considering these things in connection with the forcible abduction of the prosecuting witness, it is not strange that the jury found a verdict of guilty as charged. Indeed, any other verdict would have been surprising.

It is true that while being spirited away Henderson was told that he was being taken to some indefinite place in order that his affidavit to certain facts might be obtained. We need not go into the details of that, however, as it has never yet been held that the jury is bound to accept at its face value such self-serving declarations of one charged with a crime. Besides, it may be added, the story was so whimsical and improbable that it could justly be disregarded and repudiated.

Of course, it is not necessary for the purpose charged in the information to be accomplished in order to make it effectual as an element of the crime. All that is required is that some overt act be done toward the execution of the purpose and the fulfillment of the intent. The forcible removal of Mr. Henderson, and the other preparations indicated by what was found in the automobile, satisfy the requirement of the law in that respect. It may be illustrated by the proof of intent in burglary. Therein if the defendant is charged with the entry of a building with intent to commit larceny there must be the overt act of entering the building before a conviction can be had, but from this entry under suspicious circumstances the jury may infer the intent to commit larceny although no larceny was actually accomplished.

There is no more merit in the other contention as to a declared instruction of the court. It seems that the instructions of the court by stipulation were taken down in shorthand and afterward transcribed by the official reporter and filed with the clerk. Among these appears the following: "I charge you, gentlemen, that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or, not being pres-

ent, have advised and encouraged its commission, are principals in any crime so committed."

This is the contention of appellant: "In this instruction, the jurors were told that an accessory was one who aided or abetted in the commission of a crime, and we submit that the learned judge thereby transgressed the plain letter of the statute. He read to the jury section 31 of the Penal Code, and in doing so changed its language and perverted its meaning. We will admit for the sake of argument that the defendant did *aid* in the commission of a crime. He aided and assisted Kirkman, no doubt, in enticing or carrying away Henderson. If while this carrying away was being accomplished, he knew of the existence on the part of Kirkman of the specific intent to extort money or property from Henderson or his relatives, as charged in the information, he not only aided, but also abetted, in the commission of the crime for which he was convicted. But from this instruction the jury were led to believe that by the mere aiding in carrying away of Henderson, without abetting the crime which Kirkman intended to commit, to wit: the crime of extortion, the defendant could be found guilty, as charged in the information." It is further urged that there is no evidence that Fisher had knowledge of any such intention of Kirkman, and that said instruction was not rendered harmless by other instructions.

The rule is stated in *People v. Dole*, 122 Cal. 486, [68 Am. St. Rep. 50, 55 Pac. 581], that such instruction "is erroneous, as implying that a person who did not commit the offense may be found guilty for mere aiding of the offense without guilty knowledge and without 'aiding and abetting' the offense, but such error is cured by an instruction from which the jury could not fail to understand that aiding or assisting in the crime without guilty knowledge is not criminal." The qualification therein stated is strikingly applicable here, for the court clearly and forcibly instructed the jury that they must acquit the defendant unless they believed beyond a reasonable doubt, and to a moral certainty, that he had the intent and purpose "to extort from, or rob, the said F. W. Henderson, or to exact from the relatives of the said F. W. Henderson money or lands," etc. In fact, in several instructions he was treated as a principal, and the jury was admonished, over and over again, that they must believe every element of the crime charged had been proven against the defendant to a moral certainty and beyond

a reasonable doubt or else he must be acquitted. It is not possible that appellant was prejudiced by said instruction, if it was given. The doubt manifested in the last clause is expressed for the reason that through the proceeding known as "diminution of the record" a copy of said instruction as filed in the lower court has been presented here, duly certified by the clerk of said court, and this copy corresponds exactly with the language of said section 31 of the Penal Code, containing the words "aid and abet" instead of "aid or abet." However, this is probably not conclusive, as the trial judge did not certify that he *read* the instruction as it was *written*, whereas he certified to the transcript as containing a correct *record*. But the matter is of no importance as no prejudicial error was committed.

Appellant was justly convicted of a villainous and dastardly crime, and it requires no small degree of patience and forbearance to treat with serious consideration the technical reasons urged for a new trial. The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 4, 1916.

---

[Civ. No. 1686. First Appellate District.—March 14, 1916.]

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,  
Respondent, v. SOUTHERN PACIFIC COMPANY, Ap-  
pellant.

**NEGLIGENCE—DESTRUCTION OF AUTOMOBILE BY FIRE—SUFFICIENCY OF EVIDENCE.**—In this action for damages for the destruction of an automobile by fire, through the defendant's negligence, while on storage in a warehouse located along the line of and adjacent to the right of way and railroad tracks of the defendant, it is held that the undisputed facts were sufficient to give rise to an inference of negligence on the part of the defendant's employees in not properly extinguishing the fires which they had set along such right of way in the vicinity of the warehouse to burn off the grass, and that such

facts were also sufficient to justify the finding that the fire in question came from the defendant's tracks and was the result of the negligent acts of its employees.

**ID.—EVIDENCE—ORIGIN OF FIRE—OPINION OF FIRE CHIEF.**—In such an action it is error to permit the chief of the fire department to give his opinion as an expert witness respecting the origin of the fire, as such question is one for the court or jury, but the admission of such evidence is not prejudicially erroneous where the facts upon which the opinion was based had already been presented in evidence.

**APPEAL** from a judgment of the Superior Court of San Benito County, and from an order denying a new trial. George H. Buck, Judge presiding.

The facts are stated in the opinion of the court.

Frank McGowan, and Blaine McGowan, for Appellant.

Joseph T. O'Connor, and Coogan & O'Connor, for Respondent.

**RICHARDS, J.**—This is an appeal from a judgment and order denying a new trial in an action wherein the plaintiff recovered judgment in the sum of \$350 damages for the alleged destruction of an automobile by fire, caused through the defendant's negligence. The case was tried by the court without a jury.

The evidence as to the origin of the fire, and also as to the alleged negligence of the agents of the defendant, as the result of which it is claimed to have spread to the warehouse in which the plaintiff's automobile was stored, was conflicting, but we think the following facts are fairly deducible from the record before us:

The plaintiff's assignor, L. H. Stevens, was, in the month of June, 1912, the owner of an automobile which he kept in a certain warehouse in the city of Hollister, and which was located along the line of and adjacent to the right of way and railroad tracks of the defendant in said city. Defendant through its agents and employees undertook to burn off the grass along its right of way in the vicinity of this warehouse. They ceased this work about 4 o'clock in the afternoon, and went away after apparently extinguishing the fires. About 5 o'clock Mr. Newton, an employee of the Hollister Warehouse Company, noticed that the men who had been attending to the

fires were gone, but that there were still a few smoldering fires along the defendant's right of way which he deemed dangerous to be left, so he took a watering can and went over and extinguished these, or at least thought he had done so. On the following morning, however, about 5:30 o'clock, a man named Tennant, not an employee of the defendant, noticed smoke arising from a pile of sawdust near the warehouse, and also observed a line of burnt grass extending from the defendant's tracks to the sawdust pile, where he found a smoldering fire, which blazed up when stirred and which had charred the sill of a box factory from which the sawdust had accumulated, and which factory adjoined the warehouse. He put water on the fire, and was satisfied that he had put it out, but at 10:30 o'clock of the same morning flames burst forth in the box factory, which spread to the warehouse and destroyed the automobile of the plaintiff's assignor. There is also some evidence that during the afternoon a fire had been burning on the other side of the defendant's right of way and about forty or fifty feet from the warehouse, but there was no evidence indicating that this fire had extended across the defendant's tracks.

We are of the opinion that the foregoing facts, which are practically undisputed, were sufficient to give rise to an inference of negligence on the part of the defendant's employees in not properly extinguishing the fires they had set along the defendant's right of way in the vicinity of this warehouse, and were also sufficient to justify the finding of the court that the fire in question came from the defendant's tracks and was the result of the negligent acts of its employees.

The appellant further contends that a prejudicial error was committed by the court during the course of the trial in permitting the chief of the fire department of the city of Hollister to answer questions propounded by counsel for plaintiffs calling for his opinion as an expert witness respecting the origin of the fire. The record shows that he had been at the head of the fire department of the city of Hollister for about twelve years; that a part of his duties was to investigate and render a report upon the origin of every conflagration calling for the services of his department; that the facts upon which he predicated his opinion upon the origin of this fire were those above set forth and which were already before the court from the lips of the other witnesses. We are of the opinion that the court committed an error in permitting this witness to give his

opinion as to the origin of this fire; and that the better reasoned line of authorities holds that the question as to the origin of a fire is not ordinarily one of expert opinion, but is a deduction which the court or jury is equally competent to draw from the visible facts presented in evidence. (*Sampson v. Hughes*, 147 Cal. 62, [81 Pac. 292]; *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, [48 S. E. 521]; *Chicago & E. I. Ry. Co. v. Ross*, 24 Ind. App. 222, [56 N. E. 451]; *Smaltz v. Boyce*, 109 Mich. 382, [69 N. W. 21]; *Insurance Co. of N. A. v. Osborn*, 26 Ind. App. 88, [59 N. E. 181]; *Haynie v. Baylor*, 18 Tex. 498.)

But, conceding that the court was in error in the admission of this evidence, it does not follow that the cause should be returned for retrial because of this error. The trial was before the court; and the facts upon which alone the opinion of the witness was based had already been presented in evidence. Upon these facts we think the court would have been fully warranted in making a finding in the plaintiff's favor. In fact, we think the court could not, from all the evidence before it, aside from the opinion of the fire chief, have fairly arrived at any other conclusion as to the origin of this fire. This being so, we are constrained to hold that the error of the court was not sufficiently prejudicial to justify a reversal of the case. (*Sampson v. Hughes*, 147 Cal. 62, [81 Pac. 292]; *Estate of De Laveaga*, 165 Cal. 607, [133 Pac. 307].)

The appellant's contention that the assignment to the plaintiff of the claim upon which the action was brought was insufficient we find to be without merit.

The judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 11, 1916.

[Civ. No. 1476. Third Appellate District.—March 16, 1916.]

**KATHERINE S. CROWLEY, Respondent, v. SAVINGS UNION BANK AND TRUST COMPANY, as Executor, etc., Appellant.**

**JOINT TENANCY—SAVINGS BANK DEPOSIT—CONSTRUCTION OF WRITING.—**

A writing signed by a husband and wife at the time of the deposit of a sum of money by them in a savings bank, which provides that all moneys then on deposit, or at any time thereafter deposited by them, should be their joint property, with right of survivorship, and that such moneys were payable to either, or to the survivor, without reference to the original ownership of such moneys, constitutes a joint tenancy as to the fund with right of survivorship, and, at the death of either, the ownership of the deposit passes to the survivor.

**ID.—RECOVERY OF DEPOSIT—EVIDENCE—DECLARATIONS OF TESTATOR.—**

In an action by the surviving wife to recover the balance of such a deposit on hand at the death of her husband, the subsequent will of the deceased wherein he declared that all his property was separate property, and wherein he directed "that all moneys, bank accounts, stocks, bonds, and other securities now in the joint name or joint custody of myself and wife, constitute a part of my said separate estate and are to be administered upon by my said executor pursuant to the terms of this will," is inadmissible as evidence of an intention other than that expressed in the writing accompanying the deposit.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

Wm. H. Chapman, and Sullivan, Sullivan and Theo. J. Roche, for Appellant.

O'Gara & De Martini, and Bert Schlesinger, for Respondent.

**CHIPMAN, P. J.**—Plaintiff, the surviving widow of Timothy J. Crowley, deceased, commenced this action to recover the balance of a bank account alleged to have been deposited with defendant bank by Mr. and Mrs. Crowley in the name of T. J. Crowley or Katherine Crowley, wife, payable to the survivor of them. The amended complaint alleges:

"(2) That prior to and on the 21st day of January, 1913, plaintiff, Katherine S. Crowley and Timothy Jay Crowley, were the joint owners with right of survivorship of and in a certain deposit of money amounting to the sum of fourteen thousand thirty-four (\$14,034.92) dollars and ninety-two cents on deposit as a savings bank deposit with said defendant, a corporation, in its individual capacity. That said deposit was and is represented by ordinary deposit account No. 131,260 on the books of said defendant in its individual capacity. That said deposit was and is the balance of moneys deposited by said plaintiff and said Timothy Jay Crowley with the said corporation upon the understanding and agreement made by said Timothy Jay Crowley and plaintiff with said corporation that all moneys at any time deposited by said Timothy Jay Crowley and plaintiff, or either of them, in the said account, were and should continue to be the joint property, with right of survivorship, of said Timothy Jay Crowley and said Katherine S. Crowley, and were and should continue to be payable to them, or either of them, or to the survivor of them, without reference to the original ownership of such moneys, and upon the further understanding and agreement that the act of so depositing said moneys was and should be an absolute termination of any original ownership thereof.

"(3) That said defendant accepted said deposit and ratified and agreed to the agreement and understanding aforesaid in relation thereto.

"(4) That on the 21st day of January, 1913, and while said deposit was owned as aforesaid, and was on deposit with said defendant under said agreement and understanding, said Timothy Jay Crowley died and plaintiff survived him.

"(5) That upon the death of said Timothy Jay Crowley as aforesaid, plaintiff Katherine S. Crowley became, ever since has been, and now is the sole owner of said deposit and entitled to receive from said defendant in its individual capacity said sum of fourteen thousand thirty-four (\$14,034.92) dollars and ninety-two cents."

The cause was tried by the court without a jury. The court made the following findings:

"(1) That each and all of the allegations of plaintiff's amended complaint in the above-entitled action are true.

"(2) That at the time of the death of said Timothy Jay Crowley, deceased, said Timothy Jay Crowley was not the owner of the whole or of any part of the deposit of money described in said amended complaint except as joint owner with plaintiff, Katherine S. Crowley, subject to the right of survivorship. That upon the death of Timothy Jay Crowley, his interest in said deposit passed to plaintiff. That since the death of said Timothy Jay Crowley, his estate has not been and is not the owner of the whole or of any part of said deposit. That defendant Savings Union Bank and Trust Company, a corporation, as executor of the last will and testament of Timothy Jay Crowley, deceased, is not entitled to receive the whole or any part of said deposit and is not entitled to all or any of the interest or dividends accruing thereon or which have accrued thereon.

"(3) That since the commencement of the above-entitled action, to wit, on the 30th day of June, 1913, a dividend amounting to two hundred eighty and 70/100 (\$280.70) dollars accrued and became due upon said deposit."

It appears that after the account was opened the Savings Union changed its name to Savings Union Bank and Trust Company, the corporation otherwise remaining unchanged.

The account bearing the number 131,260 was opened on the fifth day of January, 1909, by a deposit of seven thousand dollars under the following agreement:

"San Francisco, Cal., Jan'y. 5, 1909.

"To the San Francisco Savings Union:

"All moneys now on deposit, or at any time hereafter deposited by or for us or either of us, to the credit of Timothy J. Crowley or Katherine, wife, ordy. deposit account No. 131,260, with the dividends thereon and accumulations thereof, are, and shall be, the joint property (with right of survivorship) of the undersigned, and are payable to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, without reference to the original ownership of such moneys; the act of so depositing said moneys, being absolute termination of any original ownership thereof; and are subject to all national and state laws governing such moneys, now or hereafter in force.

"This account may be terminated at any time by the board of directors of said San Francisco Savings Union; and the opening of this account is sufficient and complete evidence of

the acceptance and ratification by said San Francisco Savings Union of the terms of deposit herein set forth, without other or further action on its part.

"(Signed)

T. J. CROWLEY,

"KATHERINE CROWLEY.

"O. D. No. 131,260.

Joint agreement.

"Signed.

\$7000.00

"Your names in full: Timothy J. Crowley, or Katherine, wife.

"We admit full knowledge of the 'Conditions of Agreement' on which deposits may be made with, and will be repaid by the San Francisco Savings Union, as per copy of said 'Conditions' in our pass book, and we hereby accept same and agree to be bound thereby in the relation of depositors with said San Francisco Savings Union.

"Witness our hands and seals this Jan. 5, 1909.

"(Signed)

T. J. CROWLEY,

"KATHERINE CROWLEY.

"Address: 1403 Willard St.

"Mother's maiden name: Margaret Sheehan."

One of appellant's contentions is that the evidence shows that Mrs. Crowley was not present when this document (plaintiff's exhibit No. 4) was signed by her husband, and that it was not signed by her at that time. Such was the testimony of one of the witnesses, assistant cashier Whittle, who was deposit teller of defendant bank. He further testified: "Q. Now, at that time that \$7,000.00 was deposited in that bank, was there anything said by Mr. Crowley to you as to the character of the account? A. Well, he wished the account in the name of himself and wife."

Mrs. Crowley testified: "To Mr. Schlesinger: I live at 1403 Willard Street. I am the widow of Timothy Jay Crowley, deceased, and was his wife during the last fourteen years of his life. He died on January 21, 1913. The name Katherine Crowley appearing on plaintiff's exhibit No. 4 for identification, is my signature. I first signed that paper in the San Francisco Savings Union in 1909. I think it was, on the date appearing on the document. My husband was with me when I signed it. I read the paper over before I signed it. I understood it. My husband read the paper over to me. After he read the paper to me and after I signed it, he handed it

to me to read over myself. That is the paper that was handed to the bank officials. I have seen before these two bank-books numbered 131260, marked plaintiff's exhibits 2 and 3. I always had them in my possession. I am the Katherine S. Crowley mentioned in those bank-books." On cross-examination she testified: "To Mr. Roche: I certainly was present in the bank upon the day upon which that signature was made by me. I was present in the San Francisco Savings Union Bank the day upon which I signed this instrument, and that was the same date upon which my husband signed his name. I recall distinctly that my husband and I were both present at the time this document was signed. . . . I think Mr. Whittle filled out the body of this agreement, but I am not quite sure about that. That is my best recollection." She testified to many things she remembered as occurring at the bank and to instructions given her by her husband where to sign the document.

Mr. Whittle testified: "Upon the death of Mr. Crowley, this paper (plaintiff's exhibit 4) was amongst the official documents in our bank, and was kept in the usual place and in its present condition, with the exception of the filing marks on the reverse side. The number appearing on that contract is 131260, which is the same number appearing on the pass-book."

As to the fact of Mrs. Crowley's presence, and the signing of the agreement by her at the bank, the court accepted Mrs. Crowley's testimony and we find nothing in the record to warrant us in holding that the court was not justified in its action.

It is further contended by appellant that this account, No. 131,260, was closed on April 1, 1909, and the entire balance transferred to ordinary deposit account No. 131,975. Witness Whittle testified: "On the 1st day of April, 1909, the \$7,000.00 previously deposited at the time this account was opened was transferred to another account, numbered 131975. I cannot now recall, without referring to our records, what account that was, but in any event this account was closed." The words "this account was closed" were, on motion of plaintiff, stricken out and the ruling is assigned as error. We pause to say that we think the ruling was not error. In the sense defendant sought to apply the words they were but the

conclusion of the witness. The facts as to this transaction were fully shown.

It appeared that, on April 1, 1909, this seven thousand dollar deposit was withdrawn and deposited to an account opened in the name of San Francisco National Bank, trustee, for T. J. and Katherine Crowley, to enable this bank to issue letters of credit to the Crowleys, who intended to visit Europe. The account No. 131,260, however, was not closed, for, on April 20, 1909, a deposit was made to that account and, on the return of the Crowleys, in September, 1909, many deposits, some of them large ones, were made to this account, as shown by the ledger account and pass-books in which all the transactions, from the initial deposit of seven thousand dollars to the death of Mr. Crowley, were entered.

Witness D. L. Clarke, assistant secretary of defendant bank, testified: "Referring to ordinary deposit book No. 131260, which was marked for identification plaintiff's exhibit No. 2, I do not wish to be understood as saying that the account was closed. The book was closed and a new one issued of this same account, issued under the same number and same ledger. That particular pass-book was called in, as it appears, on October 12, 1912. It was not pursuant to any resolution of the board of directors, but it was customary, in connection with the changing of the name of the bank, for us to take in the old pass-books when they came in, whenever customers were willing to sign them, and issue a new book in the name of the bank."

The withdrawal of the initial deposit was explained, and nothing in connection with the withdrawal indicated an intention to close the account. On the contrary, deposits began to be made shortly after to this same account, and continued for a period of four years and until Mr. Crowley's death. It was an open and active account, deposits being made during the Crowleys' absence through instructions given before their departure for Europe and continued after their return, as we have said, until Mr. Crowley's death.

Mrs. Crowley testified: "I have seen before these two bank-books numbered 131260, marked plaintiff's exhibits 2 and 3. I always had them in my possession. On some occasions I withdrew money from this bank account, and on other occasions my husband drew money from it. On the occasion when I would withdraw money from this particular account, I had

the pass-book with me and presented it to the bank. I have been present at times in that bank when my husband withdrew moneys from that account and on those occasions he presented the bank-book to the bank. He had the bank-book whenever he wanted it and so did I. It was kept in our home—that is, the home of myself and Mr. Crowley. It was in the possession of both of us.”

Mr. Whittle testified: “Some of the time when Mr. Crowley came in and withdrew or deposited money, Mrs. Crowley accompanied him, and she came in by herself and dealt with the bank.” Mr. Clarke testified: “I know that withdrawals were made by both Mr. and Mrs. Crowley, that is separate withdrawals. Mr. Crowley withdrew some of these moneys on some occasions, and Mrs. Crowley withdrew. These withdrawals occurred after the opening of the account.”

The contention that the account was closed on April 1, 1909, and that subsequent deposits and withdrawals were not made under the original agreement is not supported by the evidence. On the contrary, the evidence showed that the account as represented by the two pass-books, exhibits 2 and 3, both numbered 131,260, was an open, running account to which deposits were frequently made, and from which withdrawals were also frequently made both by Mr. and Mrs. Crowley, sometimes when both were present, and at other times by them separately, from January 5, 1909, to December 24, 1912. Pass-book No. 2 was called in and pass-book No. 3 issued when the bank changed its name, but the account remained throughout under the original number, 131,260.

The agreement under which all these transactions occurred unmistakably constituted a joint tenancy as to the fund with right of survivorship, and that at the death of either the ownership of the balance, whatever it might be, remaining on deposit passed to the survivor. The right of plaintiff to the balance for which she brought the action arises from the well-understood incident of a joint tenancy—that, upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original event creating the tenancy. The principles governing this case are so well settled that discussion of them would be supererogatory. Let it suffice to refer to *Carr v. Carr*, 15 Cal. App. 480, [115 Pac. 261]; *Drinkhouse v. German Savings & Loan Society*, 17 Cal.

App. 162, [118 Pac. 953]; *Sprague v. Walton*, 145 Cal. 228, [78 Pac. 645]; *Booth v. Oakland Bank of Savings*, 122 Cal. 19, [54 Pac. 370], and the recent cases of *Kennedy v. McMurray*, 169 Cal. 287, [146 Pac. 647], and *Estate of Harris*, 169 Cal. 725, [147 Pac. 967].

There remains only to be considered alleged errors of the court in excluding certain evidence offered by defendant.

Defendant offered in evidence the will of Timothy J. Crowley, bearing date March 23, 1909, in which the testator declared: "All the property possessed by me is separate property and not community property." Two codicils were attached to this will. "Codicil No. 1" bears no date. "Codicil No. 2" is dated "San Francisco, November —, 1912." In codicil No. 1 Crowley directed: "In case of my death prior to the death of my said wife all moneys, stocks, bonds or other securities now in our possession to be drawn by me or her shall be turned over to my executors and trustees as the same constitute a part of my estate." In codicil No. 2 he makes no reference to the character of his property, and there was no evidence tending to show when codicil No. 1 was executed. Codicil No. 2 was made shortly before the last will of Crowley, which was offered in evidence and is dated December 3, 1912, and revoked all prior wills. In this will he made a declaration similar to that found in the will of 1909; also, "that all moneys, bank accounts, stocks, bonds and other securities now in the joint name or joint custody of myself and wife, constitute a part of my said separate estate and are to be administered upon by my said executor pursuant to the terms of this will." In his last will he devised the residence property to his wife and one-half of all other property for her life. These wills were admitted subject to a motion to strike out, subsequently made and granted, on the ground that they were incompetent, irrelevant, and immaterial, and on the further ground that the instruments were self-serving declarations, and hearsay, and not binding in any way upon this plaintiff, and are not competent to change the contract.

Mrs. Crowley testified that she never knew that her husband had made a will until after his death, and was never consulted as to any provisions in any will, and had no knowledge that he had made a will until after he died.

Appellant, in support of its contention that the ruling was error, cites the following California cases: *Ruiz v. Dow*, 113

Cal. 490, 497, [45 Pac. 867]; *Sprague v. Walton*, 145 Cal. 228, [78 Pac. 645]; *Kyle v. Craig*, 125 Cal. 107, [57 Pac. 791]; *Estate of Hall*, 154 Cal. 527, [98 Pac. 269]; *Fanning v. Green*, 156 Cal. 279, [104 Pac. 308]; *Fulkerson v. Stiles*, 156 Cal. 703, [26 L. R. A. (N. S.) 181, 105 Pac. 966]; *Cooney v. Glynn*, 157 Cal. 583, 588, [108 Pac. 506]; *Runo v. Williams*, 162 Cal. 444, 451, [122 Pac. 1082]; *Williams v. Kidd*, 170 Cal. 631, [151 Pac. 1]; *Bertelsen v. Bertelsen*, 7 Cal. App. 258, 261, [94 Pac. 80].

In *Ruiz v. Dow* the declarations were against interest and not in disparagement of title. So also in *Sprague v. Walton*. In the *Estate of Hall* the declarations were made at the time the husband executed the deed to his wife, and showed an intention to retain absolute ownership during his lifetime, and have title pass only upon his death. The rule of *res gestae* applied. *Fanning v. Green* was not a case involving declarations, but concerned the admissibility of testimony of the grantor as to his intention in making the deed. The court held that a witness may be examined as to the intent with which he did a certain act where that intent is a material thing in the action. In *Fulkerson v. Stiles* the question was the same. So also in *Runo v. Williams*. In *Cooney v. Glynn* the evidence showed that the will which was held admissible was intimately connected with the deed made two or three days later. The court said: "Under the circumstances appearing here, the fact of the execution of the will by Mr. Gallagher, the devise of this property to Mrs. Cooney, its subsequent destruction at the instance of the defendant and the execution of the deed in lieu thereof in trust for Mrs. Cooney, would be material and competent evidence to establish the constructive trust alleged. The evidence should have been admitted."

*Williams v. Kidd* is particularly relied upon by appellant. The vital question in that case was: Did the grantor of the land, when he placed a deed in the hands of a third party to be delivered at the death of the grantor, intend that the title to the property should pass presently to the grantee? The court held that "the solution of this case is grounded entirely on the intention of the grantor and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question"; that "acts and dec-

larations of a grantor made after he has parted with the title to the property and in disparagement of it are inadmissible when made in the absence of the grantee, but where the very question at issue is as to whether the grantor had ever parted with title, the conduct and declarations of the grantor subsequently to the making of the deed are admissible as bearing upon the issue as to whether there had been a delivery of the deed." (Syllabus.) The facts in that case were such as probably never before occurred, and will never again occur, and are not to be overlooked as a controlling factor in applying the rules there laid down. We cannot for a moment believe that the court intended to sweep aside all established rules upon the question of the admissibility of declarations by a grantor made subsequently to the grant. Indeed, the court distinctly states that declarations made after he has parted with his title, and in the absence of the grantee, are inadmissible. In the *Williams v. Kidd* case the very question at issue was as to whether the grantor had parted with title or had in fact delivered the deed. The facts and circumstances attending the transaction were very fully brought out in the opinion and are too numerous to be here repeated. Briefly, the grantor was a large owner of real property; he conceived the plan of disposing of it to take effect at his death and called in his clerk, Kidd, who was a notary, to help him work out his plan. Kidd got together what data he could but informed Williams that he thought he was hardly capable to do the work. It involved the necessity of making thirty or forty different deeds. The work was, however, commenced, and four deeds were made out and signed by Williams—one to his niece, Laura Miller (the deed to a certain warehouse property), and three others to members of his family. The deed involved was signed and acknowledged by Williams, who handed it to Kidd "with instructions to the latter to keep the same and to give it to Laura Miller, the grantee named therein, after he (Williams) was dead"; Kidd took the deed and kept it in the safe where the papers of Williams were kept until the death of Williams, eight years later, when he delivered it to the grantee, who had meanwhile become his wife; nothing further was done toward carrying out Williams' plan; the other three deeds were not delivered, and were not afterward seen; the original plan seems to have been abandoned; Williams continued to control and manage all of his property

as before, to the day of his death, and the plan he had conceived was never again mentioned; he did not recall the deed placed in Kidd's hands and never referred to it afterward; he spent several thousand dollars improving the property embraced in the Laura Miller deed; at one time, in Kidd's presence, an offer was made by a buyer to purchase this property from Williams, who claimed to own it, but he declined to consider a sale unless it included the hotel property; Kidd, at that time, and at no time, reminded Williams that he had conveyed this warehouse property to Miss Miller. The foregoing are some of the many acts and circumstances which the court held to be admissible as tending to throw light on the vital question whether there had been a delivery of the deed with the intention of presently passing title. One must read the very able and exhaustive opinion in the case fully to appreciate the rulings which the court felt constrained to make. We fail, however, to discover that the case is in any fair sense controlling here.

It seems to us that the parties interested in the fund now involved, dealt with it under an agreement so clear and unmistakable in its meaning and intent as to leave no room for doubt concerning their object originally in opening the account, and in their treatment of it from January 5, 1909, when it was opened, until January 17, 1913, when the last entry in the pass-book appears, four days before Mr. Crowley's death. He and his wife had been depositing and drawing out money from this account, amounting to many thousands of dollars, under an agreement declaring all moneys deposited to be "the joint property with right of survivorship of the undersigned, and payable to us or either of us, or to the survivor of us," and further declaring that "this right was without reference to the original ownership of such moneys; the act of so depositing said moneys, being absolute termination of any original ownership thereof." Under such circumstances, upon what principle can we say that a declaration of the husband in his will, made without her knowledge or consent, that all his property is separate property is admissible in disparagement of the interest of his surviving wife? To do so would be to hold that declarations purely self-serving, and in direct contradiction to the terms of the written instrument of the two spouses, are admissible. Here was a transaction commenced under a written declaration of the parties thereto whereby

the defendant became the trustee as custodian of the fund deposited with it. This trust relation existed and was recognized and acted upon by Mr. Crowley and his wife to the day of his death, and the fund then remaining in the hands of defendant by virtue of the executed agreement, as we think, became the property of the plaintiff by right of survivorship.

The declarations made in the will of Timothy Crowley were inadmissible as evidence of an intention other than that expressed in this executed agreement. (*Rowe v. Hibernia Savings & Loan Society*, 134 Cal. 406, [66 Pac. 569]; *Eaton v. Locey*, 22 Cal. App. 769, [136 Pac. 534]; *Batcheller v. Whittier*, 12 Cal. App. 262, [107 Pac. 141]; *Rulofson v. Billings*, 140 Cal. 452, [74 Pac. 35].) It is true that the first will was made two or three months after the first deposit was made, but its provisions were unknown to plaintiff and, so far as appears, to their trustee. The testator continued, as did plaintiff, to recognize the account with the bank as controlled by their written agreement by an unbroken series of acts inconsistent with the declarations in the will, and it was not until he made the will on December 3, 1912, a little over a month before his death, that he made any declarations as to moneys in bank, in the joint name of himself and wife, being a part of his separate estate. Codicil No. 1 to the first will bore no date, and we must presume that it was executed after the will was made, but, so far as we know, it may have been made long after, and it is fair to presume that it was made while both he and his wife were treating the account as described in their written agreement.

It was held, in *Rulofson v. Billings*, 140 Cal. 452, [74 Pac. 35], that self-serving declarations by a decedent, made outside of the presence of the person affected thereby, are inadmissible. Speaking of the rule of *res gestae*, it was held that self-serving declarations, made long subsequent to the contract sought to be enforced, are not admissible as being part of the *res gestae*. "A declaration to be admissible as part of the *res gestae*, must be an incident, or the natural and spontaneous outgrowth of the main occurrence in question, and must exclude the notion of deliberation, or calculation, or design to make evidence for future purposes." (Syllabus.)

Appellant claims that the deposit account "did not divest Crowley of his ownership of the funds, or make Katherine Crowley a joint tenant as to such funds." In support of his

claim appellant cites *Denigan v. Hibernia Savings & Loan Society*, 127 Cal. 137, [59 Pac. 389]. In that case the deposit was made by Ellen Denigan of funds concededly her separate property. She received a pass-book "entitled No. 133269, Frank Denigan or Ellen Denigan in account with the Hibernia Savings & Loan Society." Frank Denigan was the husband of Ellen. Later Ellen died, and Frank caused this deposit and its accumulations to be transferred to an account entitled "No. 212,145, Francis Denigan or James Denigan in account" with the Hibernia Bank. Still later Frank died, and the question arose whether Frank had acquired a right to this fund superior to that of the personal representatives of Ellen. The court said: "As it was conceded at the trial that at the time the money was deposited by Ellen it was her separate property, it was incumbent upon anyone setting up a claim thereto against her personal representatives to show that he had in some way acquired her title. There is nothing in the record herein showing any declarations or conversations respecting the purpose of making the deposit in the form in which it was made, or the circumstances under which the deposit was made," except the form of the pass-book. . . . "It is not shown that the husband had any possession of the bank-book until after the death of his wife. . . . The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give her husband authority to withdraw money from the bank from time to time as he might need it and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose." It was held that the administrator of Ellen's estate was entitled to judgment. A glance at the facts in that case, and the case here, shows that they are essentially unlike. In the case here the purpose of the deposit was expressly stated, and the character of the funds deposited, whether separate or community property, was expressly disposed of, and both parties to the deposit had possession of the pass-books, and both drew out money under their declared purpose in making the deposit, and both expressly stated what should become of the fund in case of the death of either.

We have been cited to no case and have been cited to no principle which convinces us that the learned trial court was in error in its conclusions of law or in its judgment.

We infer from the provisions of the last will of Crowley that he died possessed of much property aside from the balance left in this deposit account. With that property we are not concerned, but as to the deposit balance we think there can be no doubt of plaintiff's right to it.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

---

[Civ. No. 1725. Second Appellate District.—March 17, 1916.]

GEO. J. HOUSE et al., Copartners, Appellants, v. WILLIAM C. FRY et al., Respondents.

**NEGLIGENCE—DAMAGE TO MOTOR TRUCK—COLLISION WITH AUTOMOBILE—**

**EVIDENCE—PROXIMATE CAUSE OF INJURY.**—In this action for damages to a motor truck from a collision with an automobile driven by one of the defendants, while the latter was attempting to pass the former upon a city street, it is held, under the evidence, that the proximate and effective cause of the collision was the violation by the defendant of the provision of the street ordinance requiring the driver of any vehicle, in overtaking and passing any other vehicle, to pass to the left, and not to drive to the right until clear of such vehicle, and not the violation by the plaintiff of the provision of the ordinance requiring the driver of any vehicle to keep as close to the right-hand curb as possible on all occasions.

**ID.—LIABILITY OF MINOR FOR TORT.**—A minor is civilly liable for a wrong done by him.

**ID.—NEGLIGENCE OF CHAUFFEUR—LIABILITY OF OWNER.**—The owner of the automobile is liable for the negligence of the chauffeur, notwithstanding the latter was, at the time of such collision, driving the car in violation of instructions of the owner to wait for further orders before proceeding on the trip, where it appears that such driver was, at such time, on his way to a telephone to obtain such instructions.

**ID.—MASTER AND SERVANT—DISREGARD OF INSTRUCTIONS—WHEN MASTER LIABLE.**—Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding the directions of the employer, the latter may be held liable.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Wm. D. Dehy, Judge presiding.

The facts are stated in the opinion of the court.

Earle M. Daniels, and Julius V. Patrosso, for Appellants.

Hanson, Hackler & Heath, for Respondents.

CONREY, P. J.—On February 21, 1914, Lester House, one of the plaintiffs, was driving a motor truck easterly on Sunset Boulevard in the city of Los Angeles. The defendant Lawrence Fry, at the same time was driving an automobile, the property of the defendant William C. Fry, easterly on the same street, in the rear of the truck. While endeavoring to pass the truck the automobile, when it came to the place where it was even with the truck, was two or three feet distant from the truck and was moving at the rate of more than twenty miles per hour and the truck was moving at the rate of eighteen miles per hour. Fry did not blow the horn, or give any other warning of his approach, and in passing the truck did not give any signal indicating his intention to change the course of the automobile, and House did not know that the automobile was there until the two vehicles were even with each other, traveling side by side. Thereupon Fry turned toward the right for the purpose of passing in front of the truck, and the right rear wheel of the automobile collided with the front left wheel of the truck. By the force of this collision the steering-rod of the truck was broken so that the driver had no further control of his machine, and it ran into the curb on the right-hand side of the road, causing further injuries to the truck. By this action the plaintiffs seek to recover damages for the injuries to the truck. From a judgment in favor of the defendants the plaintiffs appeal.

Ordinance No. 24,360 of the city of Los Angeles is an ordinance regulating the operation of vehicles upon streets. It is conceded that the accident in question occurred in a portion of the city where, under the terms of the ordinance, it is unlawful to travel in excess of twenty miles per hour. Sections 6, 8, 9 and 10 of the ordinance are as follows:

“Sec. 6. The driver of any vehicle, upon meeting any other vehicle at any place upon any street shall turn to the right, and, on all occasions, shall travel on the right-hand side of such street, and as near the right-hand curb thereof as possible. . . .

"Sec. 8. The driver of any vehicle shall, in overtaking and passing any other vehicle in or upon any street, pass to the left of such vehicle, and shall not drive to the right until clear of such vehicle, and the driver of such vehicle being so overtaken and passed shall give way to the right.

"Sec. 9. The driver of any vehicle moving slowly in, along or upon any street shall keep such vehicle as close as possible to the curb on the right, allowing more swiftly moving vehicles free passage to the left.

"Sec. 10. The driver of any vehicle, in or upon any street, shall before turning, stopping or changing the course of such vehicle, and before turning such vehicle when starting the same, first see that there is sufficient space for such movement to be made in safety, and shall then give a plainly visible or audible signal to the police officer in charge of the crossing or to the drivers of vehicles behind the vehicle so turning, stopping, changing its course or turning from a standstill, of his intention to make such movement. Such signal shall be given by raising the hand or whip and indicating with it the direction in which the turn is to be made."

Lawrence Fry is the son of William C. Fry, and at the time of this accident Lawrence was a minor aged twenty years; but the plaintiffs are not asserting any liability of defendant William C. Fry on account of the fact that the codefendant is his son. The plaintiffs do claim, however, that such liability exists upon the ground that the automobile was the property of William C. Fry, and was being driven by Lawrence Fry for the benefit and under the direction and control of William C. Fry. It is charged that the defendant, Lawrence Fry, at the time in question drove the automobile in a manner contrary to the ordinance, and in a negligent, dangerous, and highly reckless manner.

Sunset Boulevard, at the place where this accident occurred, is a street about one hundred feet wide on which is located a double-track electric street railway. At the point in question the distance from the south curb of the street to the nearest railroad track is twenty-nine feet. At the time of the accident the truck was carrying a load of one ton, the left wheels of the truck were distant two feet south from the most southerly rail of the railroad tracks, and the right wheels of the truck were distant twenty-one feet from the curb, the distance between the wheels of the truck being about six feet. There

was at that time no obstruction in front of the automobile in the direction in which these vehicles were moving, and the automobile could have continued in a straight line until it had passed entirely clear of the truck without incurring any additional danger.

The automobile was used principally for business of defendant William C. Fry, but was sometimes used by his family with his permission. William C. Fry did not know how to operate the machine, and was accustomed to have it driven for him by his son when the father needed it for business purposes. On the afternoon in question William C. Fry telephoned to his home that Lawrence should wait there for him until William C. Fry would telephone for the son to come down to the city and meet him; but instead of waiting for further orders, Lawrence started away in the automobile to go to a telephone in order to ascertain where his father was so that he could bring him home. While driving the car under these circumstances, and before receiving further orders from his father, Lawrence drove the automobile easterly on Sunset Boulevard to the place where the accident occurred. Prior to the time of this accident William C. Fry had given a general instruction to his son not to take the car out for more than "a short distance," unless William C. Fry was at home and gave him permission. With this limitation, he had not objected to his son taking the machine out for the boy's own purposes.

Inasmuch as the findings of the court are in favor of the defendants, we have made the foregoing statement of facts in part upon undisputed evidence, and, wherever the evidence was conflicting, we have stated the facts most favorably to the defendants, in accordance with the presumption which on appeal runs in favor of the findings wherever there is a substantial conflict in the evidence.

The court found that it is not true that the defendant Lawrence Fry at the time in question was driving the automobile for the benefit of the defendant William C. Fry, and under his direction and control, but, on the contrary, found that it was being driven without the knowledge or consent of William C. Fry, and contrary to his express orders and commands. The court further found that the automobile, at the time in question, was not being driven unlawfully or in a manner contrary to the ordinance, or in a negligent, dangerous, and reckless

manner; and found that the plaintiff, Lester House, at the time and place in question was not lawfully operating the motor truck and was not attempting to proceed exercising due care and reasonable caution; that the plaintiff, Lester House, was not driving his truck as close to the right-hand curb as possible, as required by the ordinance; that defendant, Lawrence Fry, in order to pass the plaintiff, was compelled to drive over and across the street-car tracks lying in the street; that the plaintiff, Lester House, saw defendant Lawrence Fry, and saw that he was endeavoring to pass the truck by driving by the plaintiff, but that House did not give way to the right as required by the ordinance; and that the said violations of the ordinance by the plaintiff, Lester House, contributed directly and proximately to cause the accident.

Appellants challenge the sufficiency of the evidence to support these findings of fact, and it becomes our duty to determine whether the evidence to which we have referred is sufficient to sustain these findings.

Section 9 of the ordinance is not applicable to this case. The truck, moving at the rate of eighteen miles per hour, could not be said to be traveling "slowly," since the limit of lawful speed under that ordinance, at the place of the accident, is twenty miles. The truck was being operated in violation of section 6, in that it was not kept reasonably near to the right-hand curb. But the fact that the automobile had passed to the left of the truck, with ample space between them, and had a free way open before it, compels the conclusion that the negligence of House, in traveling farther from the curb than he should have done, was not a direct and proximate cause of the collision. Therefore the defense of contributory negligence, pleaded by the defendants in their answer, is not sustained by the evidence.

The defendant, Lawrence Fry, was guilty of negligence, and violated the requirements of section 8, in that he drove to the right, while endeavoring to pass in front of the truck, before his automobile was clear of the truck; and his negligence was the proximate and sole effective cause of the collision. No warning having been given to House of the approach of the automobile, he did not learn of its presence until it was too late for him to avoid the collision by turning to the right (which under section 8 would have been his duty), and his failure to turn to the right was not, under the circum-

stances, negligence causing or contributing to the occurrence of the collision. It follows that the plaintiffs were entitled to judgment against the defendant Lawrence Fry. "A minor . . . is civilly liable for a wrong done by him. . . ." (Civ. Code, sec. 41.)

The court's finding that the automobile was being driven without the knowledge of William C. Fry, and contrary to his express order, is sustained by the evidence. He had sent a telephone instruction, which was communicated to his son, to wait at home for further orders, and this instruction was disobeyed. But it also appears, without conflict, that the trip was being made for a purpose within the general scope of the authority of Lawrence Fry as chauffeur for his codefendant, and for the purpose of finding William C. Fry to bring him home, as was customary with them. "Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding directions of the employer, the employer may be held liable. (1 Shearman and Redfield on Negligence, 5th ed., sec. 145 et seq.)" (*Adams v. Weisendanger*, 27 Cal. App. 590, [150 Pac. 1016].) On the facts of this case, the plaintiffs were entitled to recover against both defendants.

The judgment is reversed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 14, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1916.

---

[Civ. No. 1589. First Appellate District.—March 20, 1916.]

**D. L. FOX, Respondent, v. WINDEMERE HOTEL APARTMENT COMPANY et al., Appellants.**

**LODGING-HOUSE—WHAT CONSTITUTES.**—Where a house is under the direct control and supervision of the owners, rooms are furnished and attended to by them, and they or their servants retain the keys thereto, a person renting such a room makes himself a lodger and

not a tenant, and the owners are lodging-house keepers, within the meaning of section 1861 of the Civil Code, giving such a person a lien as security for unpaid rent.

**ID.—CLAIM AND DELIVERY—TRUNK AND CONTENTS HELD FOR UNPAID RENT—TENDER—MATERIAL ISSUE—FINDINGS.**—In an action of claim and delivery to recover a certain trunk and its contents by one claiming to be the owner, in which action defendants claim a lien under section 1861 of the Civil Code to secure unpaid rent, whether or not a legal tender of the amount alleged to be due was made, is a material issue upon which a finding should be made.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Hiram E. Casey, for Appellants.

Wm. G. Weiss, for Respondent.

**KERRIGAN, J.**—This is an action in claim and delivery brought by plaintiff to recover a certain trunk and its contents, in possession of the defendants, of which plaintiff claimed to be the owner. The defendants, answering, alleged that they came into possession of the property as lodging-house keepers, and that they detained it by virtue of a lien, given to them as such by the provisions of section 1861 of the Civil Code, as security for the payment of the sum of \$13.60 claimed to be due to them from plaintiff.

The case went to trial, and the plaintiff recovered judgment for the return of the property, or its value in case its return could not be had, the value being found by the court to be \$750. Defendants appeal.

It appears that the plaintiff occupied three rooms, paying therefor \$55 per month, in the certain premises conducted by the defendants known as the Windemere Hotel Apartments; that he quit possession of his rooms owing to the defendants the sum of \$13.60, and the latter refused to allow him to remove the personal property in question from the premises, claiming, as above indicated, that they had a lien thereon to secure payment of the amount due them. Plaintiff offered testimony to show that he had tendered this amount to the defendants, but that they had refused to accept it. The testimony, however, upon this question was conflicting, and the

court failed to make any finding whatever upon the subject, but rendered judgment in favor of plaintiff.

In support of the judgment it is the contention of plaintiff that the defendants were not lodging-house keepers within the meaning of section 1861 of the Civil Code, and were therefore not entitled to a lien.

Upon this question the evidence shows that the defendants resided upon the premises and at all times had control and supervision over the same; that they had a hotel-keeper's license; that they offered for rent and rented rooms by the day, week, or month, or from month to month; that the premises consisted of fifty-eight apartments or suites of rooms; that all rooms, including those let to the plaintiff, were rented completely furnished; that the defendants retained keys to all the suites or apartments, and had access to them at all times for the purpose of keeping them in order; that they furnished the necessary linen, kept the carpets and windows clean, swept the hallways and removed the garbage, and in fact, it may be inferred from the record, that they also furnished the necessary light and heat, and did everything that lodging-house keepers usually do in the maintenance of a lodging-house.

Such was the showing made by the defendants. On the other hand, there was no attempt made by the plaintiff to distinguish the defendants' business as thus conducted from the ordinary lodging-house; in other words, there was no showing, for example, that the building was divided into separate sets of apartments or suites of rooms intended as homes or for the residence of families living independently of one another, and in which each family or household is provided with rooms, including kitchen, bathroom, and toilet. These are elements which would tend to constitute an apartment house (3 Corpus Juris, 251). If such evidence had been produced a different question would have been presented for determination. Under the circumstances of this case the mere fact that the word "apartment" appears as a portion of the designation of the premises is not sufficient to overcome the evidence in the case tending to show that the premises were in fact a lodging-house. A lodging-house is none the less such because it contains furnished apartments that are let out by the week or month (*Cromwell v. Stephens*, 2 Daly (N. Y.), 15). Where, as here, the testimony shows that the house was under

the direct control and supervision of the owners, that the rooms were furnished and attended to by them, and that they or their servants retained the keys thereto, a person renting such a room makes himself a lodger and not a tenant. (*Mes-serly v. Mercer*, 45 Mo. App. 327; *Wilson v. Martin*, 1 Denio (N. Y.), 602; *Toms v. Lockett*, 5 C. B. 23, [136 Eng. Reprint, 781]; *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, [58 N. E. 576]; *Pullman Car Co. v. Lowe*, 28 Neb. 239, [26 Am. St. Rep. 325, 6 L. R. A. 809, 44 N. W. 226]; *Smith v. St. Michael*, 3 El. & El. 383, [107 Eng. C. L. 383, 121 Eng. Reprint, 486]; *Stamper v. Sunderland-near-the-Sea*, L. R. 3 C. P. 388; *Reg. v. St. George's Union*, L. R. 7 Q. B. 90.)

It does not appear from the record before us upon what theory the lien was denied; it may have been on the theory that a legal tender was made to the defendants of the amount due. This was a material issue upon which there should have been a finding.

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

---

[Civ. No. 1799. First Appellate District.—March 21, 1916.]

J. J. BARRY et al., Respondents, v. F. F. JACKSON, as  
Commissioner, etc., Appellant.

**CITY OF OAKLAND—ORDINANCE CHANGING POSITIONS OF SANITARY AND PLUMBING INSPECTOR—INTERFERENCE WITH CIVIL SERVICE SYSTEM.**  
Under the provisions of the freeholders' charter of the city of Oakland, which took effect July 1, 1911, and which introduced into the government of that city for the first time a civil service system, the city council cannot circumvent the object and purpose of the civil service system, by enacting an ordinance giving to the positions of deputy plumbing inspector and assistant sanitary inspector the name of deputy sanitary and plumbing inspector, without making any change in the duties of such position, and remove the incumbents under civil service regulation and appoint other persons in their places, and *writs* will lie to compel the commissioner of public health and safety to reinstate such discharged employees.

**APPEAL** from a judgment of the Superior Court of Alameda County. William H. Donahue, Judge.

The facts are stated in the opinion of the court.

Paul C. Morf, City Attorney, and George E. Jackson, Assistant City Attorney, for Appellant.

Charles A. Beardsley, for Respondents.

KERRIGAN, J.—This is an appeal from a judgment ordering a peremptory writ of mandate to issue, directing the appellant, as commissioner of public health and safety of the city of Oakland, to reinstate the respondents, petitioners in the trial court, to certain positions in the health department, under and in conformity with the findings and decision of the civil service board of that city.

The city of Oakland is governed by a freeholders' charter, which took effect July 1, 1911. That charter introduced into the government of the city for the first time a civil service system. Four years after the city had been operating under that system a new mayor and two new commissioners were elected, and they constituted a majority of the city council. The appellant was one of the new commissioners, and he was assigned to the department of public health and safety as commissioner thereof.

On the first day of its term the new administration introduced into the city council an ordinance, numbered 885 N. S., which repealed ordinance No. 350. The new ordinance abolished many of the old places of employment in the department of public health, and created, or attempted to create, new ones, the final result being a reduction in the number of employees of this department from thirty-four to thirty-three, and a saving in expense to the city of six hundred dollars per annum. The new ordinance was finally passed and took effect July 20, 1915.

Sections 5 and 6 of this ordinance provided as follows:

"Section 5. There are hereby created two positions of Deputy Sanitary and Plumbing Inspectors, and the salary of each thereof is hereby fixed at not less than one thousand five hundred (\$1,500) dollars and not more than one thousand six hundred and twenty (\$1,620) dollars per year payable in equal monthly installments.

"Section 6. There are hereby created two positions of Deputy Sanitary and Plumbing Inspectors, and the salary

of each thereof is hereby fixed at twelve hundred (\$1200) dollars per year, payable in equal monthly installments."

It will be noted that the four places of employment provided for in these two sections bear identically the same names, but the salaries are materially different.

The old ordinance had provided for two positions of deputy plumbing inspector, and for four positions of assistant sanitary inspector, and provided for a supervising officer known as chief plumbing and sanitary inspector, who was not subject to civil service regulation. Under the new ordinance provision was made for a chief plumbing inspector and also for a chief sanitary inspector, both of whom were exempt from civil service rules.

On and prior to the passage of the new ordinance respondents Barry and Cordan were deputy plumbing inspectors, and respondent Poole was an assistant sanitary inspector, which positions were among those contained in the classified civil service of the city, and were positions created by the old ordinance. Immediately upon the passage of the new ordinance the defendant notified petitioners that their respective positions had been abolished, and that their employment had terminated by the repeal of ordinance No. 350. The defendant also at once advised the civil service board of the passage of ordinance No. 885 N. S., and of the notice given to petitioners terminating their employment; and, acting upon the theory that there was no eligible list for the positions provided for in sections 5 and 6 of ordinance 885, requested the approval of the civil service board of temporary appointments made by him of three men without civil service standing, two being for positions provided for in section 5, and one for one of the places provided for in section 6 of the new ordinance.

Under the city charter if the places of employment created by sections 5 and 6 of ordinance 885 did not fall within the classified civil service, then, with the consent of the civil service board, the appointing power could make temporary appointments for a period not exceeding eight months. It was under this provision of the charter that the appellant sought approval of the temporary appointments just adverted to. In order to determine whether there was any eligible list applicable to the places of employment provided for in these sections of the new ordinance, and in order to determine whether the temporary appointees were fitted for the posi-



tions, the civil service board made an investigation, received and considered evidence, and found in accordance therewith that the duties attached to the places of employment provided for in section 5 of ordinance 885 N. S., and designated "deputy plumbing and sanitary inspectors," were identical with those of the positions designated as "deputy plumbing inspectors" by ordinance No. 350 N. S., which latter positions were held by petitioners Barry and Cordan. The board also found that the duties attached to the places of employment provided for in section 6 of ordinance No. 885 N. S., and designated by the same name of "deputy plumbing and sanitary inspectors," were the same as the duties attached to the places of employment designated in ordinance No. 350 N. S. as "assistant sanitary inspectors," one of which positions was held by the petitioner Poole.

Again, the petitioners, availing themselves of a provision of the charter, prosecuted an appeal before the civil service board, claiming to have been wrongfully discharged from their positions. This was a proceeding more formal than the investigation held by the board to ascertain the duties of the so-called new positions, and to classify the same, and upon the trial both sides were represented by counsel; testimony was introduced, and the board again unanimously found in a formal resolution that the duties under both ordinances were the same, and that the petitioners were entitled to reinstatement.

From the record before us it appears that the civil service board, both in its investigation undertaken for the purpose of classifying the so-called new positions, and upon the formal hearing of the appeal of the petitioners, received all available testimony, and decided in both proceedings that the positions under the old and new ordinances were substantially the same, and directed that the petitioners be restored to their employment. They called before them and received the testimony of the two men who were appointed under the new ordinance by the appellant as the heads of the plumbing and sanitary departments respectively; they also took the testimony of Joseph S. Biven, who was assistant sanitary inspector under the old ordinance, and who remained in the employ of the city under the new one, rendering the same services as he performed theretofore; they examined the daily report cards of the work done by the new employees who filled the positions

of the removed men; the city efficiency expert, together with others, also testified before the board, and, after full hearing, and after duly considering all the testimony introduced by the parties, the board found that while the positions provided for in the two ordinances bore different titles the duties thereunder were the same.

It is not claimed—or in any event no evidence was introduced at the trial in the superior court—to show that the conclusions reached by the civil service board were not sustained by sufficient evidence, and hence this court in common with the trial court is bound by the conclusions of the civil service board. While the language of the new ordinance may indicate that the positions under the two ordinances are essentially different, it certainly does not, as asserted by the appellant, overcome the presumption that the evidence received by the civil service board showed that the difference between the places of employment under the two ordinances was merely one of name, and that the duties under them were similar. According to the findings of the civil service board it would appear that in effect the city council was endeavoring to circumvent the object and purpose of the civil service system. On this phase of the case the trial court in an oral opinion pertinently said: "There are something like 1200 or more employees of the city of Oakland that come under civil service. Of that number in the neighborhood of twenty-five are what might be termed created by the charter; that leaves 1100 or more places of employment where the tenure of office is in some respects similar to the tenure of office of the petitioners here. Civil service in its true sense means the substitution of business principles and methods in the conduct of the business of government, and especially the merit system instead of the spoils system in the matter of appointment to office, in order to obtain competency and greater efficiency by continued employment of faithful employees. Whether a person may feel that civil service is good, or whether he feels that it is bad, the only way that anything can be obtained by civil service is to carry out the intention of the framers of the charter as set forth in art. 13, and have the provisions thereof enforced. If respondent's contention in this matter should prevail, it would mean in my view that all the council would have to do would be to repeal the ordinance creating the positions of the 1100 employees and enact new ordinances



giving the respective positions different names, and by that means civil service could be destroyed."

The appellant also claims that under the provisions of the charter the civil service board has authority to hear an appeal only when an employee has been discharged, and not in a case where his position has been abolished. The board, on the investigation made by it for the purpose of classifying the places provided for by the new ordinance, found that the positions of the petitioners had not been abolished. But even if it can be said that in repealing the old ordinance the old positions were, technically, at least, abolished, and hence that the board had no jurisdiction to hear the appeal, still it is not questioned that the civil service board, when it made its investigation for the purpose of classification, determined that the places of employment were the same under the new ordinance as under the old, from which it follows that the petitioners were entitled to be restored to the positions from which they were removed.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

---

[Civ. No. 1742. First Appellate District.—March 22, 1916.]

**HARRISON H. ROUNTREE et al., Respondents, v. W. W. MONTAGUE et al., Appellants.**

**ESTATE OF DECEASED PERSON—ORDER SETTING APART HOMESTEAD—QUANTITY IN EXCESS OF STATUTE—FAILURE TO APPEAL—TITLE OF WIDOW.**—An order setting apart to the widow of a deceased person as a probate homestead a quantity of land exceeding twenty acres in extent, under the homestead law which then provided that such a homestead should not exceed twenty acres in extent, is not void, as being in excess of the jurisdiction of the court, and where such order has not been appealed from, the title to the homestead under the order is vested in the widow in fee.

**Id.—NATURE OF PROBATE PROCEEDINGS.**—Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings *in rem*, and judgments therein so far as they relate to the disposition of the property of the estate are binding upon the parties interested.

**1A.—JURISDICTION—VALIDITY OF JUDGMENT—ERROR.**—The only question to be considered upon the hearing of an application for probate homestead is, did the court have authority to determine the subject matter of the controversy and jurisdiction over the thing proceeded against; and where the court has jurisdiction, mere error in its judgment will not vitiate the decree.

**1A.—SPECIFIC DEVISE—HOMESTEAD RIGHT NOT AFFECTED.**—The right of the widow to such a homestead is not affected by reason of the fact that the premises out of which it was carved were specifically devised to her for life, in the absence of anything in the will to show that the testator intended the specific devise of a life estate to his wife to be in lieu of any rights which she might acquire under the statutes making provision for a probate homestead to her as his widow.

**1A.—NATURE OF HOMESTEAD RIGHT OF WIDOW.**—The right of a widow to a probate homestead is an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise.

**1A.—SALES OF REAL ESTATE—PAYMENT OF FAMILY ALLOWANCE AFTER MARRIAGE—FAILURE TO APPEAL—VALID ORDERS.**—Orders authorizing and confirming sales of real estate to pay the amount of the family allowance accruing subsequent to the marriage of the widow of the deceased, are not subject to attack, where no appeal was ever taken therefrom, and the purchaser of the property at such sales acquires a valid title thereto.

**1A.—ORDER FOR FAMILY ALLOWANCE—FRAUD.**—An order of sale of real estate of a deceased person is not subject to attack on the ground of fraud and conspiracy in the administration of the estate in keeping such family allowance alive after the widow's marriage, where no proof of such fraud is shown other than by the record itself, from which it appears that the court was fully advised of such marriage, and it is also made to appear that no decision had ever been made, at that time, to the effect that an order for family allowance ceased on the marriage of the widow.

**1A.—JUDGMENT—ATTACK FOR FRAUD—ESSENTIALS.**—A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined.

**1A.—SPECIFIC DEVISE—HOMESTEAD—LACK OF ESTOPPEL.**—The widow in such a case is not estopped from claiming that she acquired the fee in the homestead premises by virtue of the fact that she took under the will a life estate in another part of the premises, in the absence of anything in the will or otherwise putting her to an election.

**APPEAL** from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

J. A. Cooper, P. L. Benjamin, and Walter H. Linforth, for Appellants.

S. F. Leib, and Edwin A. Wilcox, for Respondents.

LENNON, P. J.—In this action the plaintiffs sought and recovered a judgment quieting their alleged title to a certain tract of land situate in the county of Santa Clara and consisting of some two hundred acres. The plaintiffs are the heirs of Elizabeth Rountree, and their claim of title to the lands in suit is based upon allegations to the effect that they succeeded to the same as the remaindermen mentioned in the last will and testament of one Philip Southworth. The defendant, W. W. Montague, who is in possession of the lands in suit, answering the plaintiff's complaint, disclaimed any interest in a certain designated thirty-two and one-half acres of the whole tract, and affirmatively admitted that the title to such acreage was in the plaintiffs under the terms of the will referred to, but he denied that the plaintiffs have any interest or title in or to any part of the remainder of the lands in suit. The judgment of the lower court was rendered and entered for the plaintiffs, and this appeal is from that judgment and from an order denying the defendant a new trial.

The pleaded and proven facts of the entire case are practically undisputed, and may be substantially stated as follows: Elizabeth Mary Montague, the deceased wife of the defendant, W. W. Montague, was, at the time of her marriage to the latter, the widow of Philip Southworth, to whom she had been married in February, 1856. At that time Southworth was the owner of the land in question, and it was his separate property at the time of his marriage. Upon his marriage and down to the time of his death—which occurred on the thirty-first day of December, 1860, he and his wife resided upon said lands. Southworth left a last will and testament dated April 1, 1858, by the terms of which his widow was appointed executrix, and Joseph C. Vandervoort and George I. Bragg executors. Both the widow and Vandervoort renounced their right to serve. Thereafter, on the third day of January, 1861, the will was admitted to probate and Bragg was appointed

sole executor thereof. By the will Southworth directed that his personal property be sold, and that out of the proceeds thereof his sister, Lydia H. Rountree, should be paid the sum of ten thousand dollars, and his wife the sum of fifteen thousand dollars. The estate proved insufficient to satisfy either of these bequests after the payment of the expenses of administration, and, accordingly, they were not paid. In addition to this bequest to his wife the will of Southworth devised to her a life interest in the lands in controversy, with remainder to her issue, and in the event of no issue, remainder over to the children of Lydia H. Rountree, the sister of Southworth.

On March 12, 1908, some fifty years after the making of the will, Mrs. Southworth (who subsequently became the wife of the defendant) died without issue. The plaintiffs in the action are the children and grandchild of Lydia H. Rountree. Upon ascertaining the fact of Mrs. Montague's death, and before the commencement of this action, the plaintiffs made a written demand upon the defendant W. W. Montague as an individual, and as executor of the will of Elizabeth M. Montague, deceased, for the surrender of the possession to the plaintiffs of the two hundred acres of land in suit. Montague refused to comply with the demand, and thereupon the plaintiffs brought this action.

The refusal of the defendant to comply with the demands of the plaintiffs was based upon the rendition and entry of certain decrees in probate made during the administration of the estate of Philip Southworth, wherein all of the lands in suit excepting the thirty-two and one-half acres (title to which was disclaimed by the defendant) were either segregated and set apart to Southworth's widow as a homestead, or were sold to pay the expenses of the administration of the estate and the debts of the deceased. The portions of the land in suit so sold were purchased by Montague and subsequently by him conveyed to his wife, from whom he now derives his claim of title. The defendant, as an additional source of title, also claims that upon the death of Southworth the entire two hundred acres vested absolutely in his widow under the Homestead Act in force at that time. As a further defense to the action the defendant insists that it is barred either by the statute of limitations or under the doctrine of laches. In opposition to these claims of the defendant the plaintiffs assert and insist that Mrs. Montague, as the surviving wife of South-

worth, took under the terms of the will a life estate in a portion of the premises; and, accordingly, they contend that when Mrs. Montague accepted this life estate she was, under the familiar doctrine that a person cannot take under and against the terms of the same will, precluded from acquiring the fee in any portion of the two hundred acres under the subsequently acquired homestead; and further, that by accepting the life estate under the will she thereby created the relation of life tenant and remaindermen between herself and the plaintiffs, in the entire two hundred acres, and was thereafter forever precluded from converting her life estate in any portion of the premises into a fee, with the resultant destruction of their rights in the estate as remaindermen. It is further urged upon behalf of the plaintiffs that any right or estate beyond the life estate acquired by Mrs. Montague inured to the benefit of plaintiffs as remaindermen; that Mrs. Montague's possession under the will was the only rightful one; and that the plaintiffs, being merely contingent remaindermen, not only had no right during her lifetime to the possession of the premises, but had no cause of action therefor until Mrs. Montague died without issue.

The probate decrees under which the defendant Montague claims title to the lands in suit are assailed by the plaintiffs as being void and ineffectual for any purpose upon several grounds. In this behalf it is asserted that the decree attempting to segregate the homestead was void as being in excess of the probate court's jurisdiction, which excess, it is claimed, appears upon the face of the decree itself; that the probate decrees directing and confirming the sales of certain portions of the property for the purpose of paying the debts and expenses of administration, were in fact had for the payment of Mrs. Montague's claim for family allowance which had accrued after her marriage to Montague, and that said sales were void because of the alleged collusion of the executor and his attorney and Mr. and Mrs. Montague in procuring the sales and decrees to be made for the purpose of paying such claim. In this connection it is argued for the plaintiffs that their right of action for the possession of the lands in suit under these alleged circumstances was not barred by the statute of limitations nor by the doctrine of laches, irrespective of any relationship of life tenant and remaindermen existing between Mrs. Montague and the plaintiffs.

Under the first of these contentions, viz., that the Montagues were estopped from advancing a claim to a fee in any part of the two hundred acres under the probate decrees after she took the benefit of a life estate under the will, plaintiffs in no wise attack those decrees, but, on the contrary, and for the purpose of their argument, assume them to be valid and free from defect. They base their right to recover, in addition to the claim of fraud (which they also urge in an independent argument against the validity of the decrees), upon the ground that Mrs. Montague's equitable obligations and duties to the remaindermen precluded her from taking advantage of them, and that the defendant, as her representative and successor in interest, is likewise estopped from interposing the bar of the statute.

These are in substance the issues which were presented to the trial court for determination; and they are now before this court for review.

We will first discuss the effect of the decree of the probate court in segregating and setting apart to Mrs. Montague, while she was the widow of Southworth, a probate homestead of 51.98 acres, and also the effect of the decrees ordering and confirming the sales of the two parcels of seventy-eight and thirty-two and one half acres respectively for the payment of claims against the estate of Southworth, and the title acquired thereunder by his widow.

With reference to the probate homestead it will be noted that on the 25th of February, 1861, Mrs. Southworth, by her attorney, J. Alexander Yoell, filed her petition in due form in the probate court for an order setting apart to her a probate homestead. In the petition she recited the fact that she claimed to have a homestead in the whole of the two hundred acres, which had been appraised at fifteen thousand dollars. The reason for the application for the probate homestead was no doubt due to the fact that claims against the estate had been presented far in excess of its value, and that the estate was apparently hopelessly insolvent. Two days after the filing of her petition the probate court made an order setting apart to her, as the widow of Southworth, "so much of said premises in a compact form together with the dwelling-house of said deceased situate thereon, as are of the value of \$5,000," and in the same order the court appointed the county surveyor and two other persons to set apart, survey off, and segregate

said homestead out of the premises here in question—the two hundred acres being specifically described in the order. In May of the same year the surveyors made a report to the effect that they had surveyed and segregated 51.98 acres of the two hundred acre parcel, which report was accompanied by a map describing and locating it, and the report added that the portion so segregated did not exceed in value the sum of five thousand dollars. Thereafter one J. W. Owen, an attorney appointed by the probate court to represent absent heirs, made and filed his objections in writing to the report of the appraisers upon the ground that the widow could not take the homestead, for the reason that she was given a life estate in the premises under the will, and therefore it would be inconsistent to permit her to take the 51.98 acres as a homestead. No action, it seems, was ever taken upon this objection, further than to transmit it to the superior court for hearing and determination. After considerable delay—the reason for which is not disclosed by the record—the court, on the fourth day of October, 1862, made an order confirming the report of the appraisers, in which it referred to the former action of the court setting aside the homestead. Some two months prior to the making of the order last referred to Mrs. Southworth had married the defendant, W. W. Montague, and the court in confirming the order referred to her as “Elizabeth Mary Montague, widow of said Philip Southworth.” The order of confirmation described the premises as contained in the report of the appraisers, and made no change in the homestead boundaries.

As before stated, it is the claim of the defendant Montague that the title to the 51.98 acres vested in Elizabeth Mary Southworth by reason of this decree, and he claims through her thereunder. Plaintiffs deny that any title was created in the 51.98 acres so segregated and set apart by or under this order, for the reason that the rights of the applicant had lapsed under the general Homestead Act at its date; and for the further reason that, viewed as a decree purporting to segregate a probate homestead under the Probate Act, it was void in two essentials, viz., (1) that it was not set apart to the widow of Southworth, the applicant being married at the time to the defendant Montague; and (2) that the land so segregated was not limited to an area of twenty acres, both of which essentials were required by the statute.

This argument is predicated upon the theory that the probate homestead was not finally set apart until the order confirming the report of the appraisers had been made; and it was upon this theory that the trial court found and concluded that the homestead was set apart under the Probate Act, and not under the act of 1860, which had been repealed.

If the applicant took title under the original order of the probate court, there is no question but that the title vested in her absolutely. At the date of the death of Southworth, and at the time the petition for a probate homestead was filed, the act of 1860 (Stats. 1860, pp. 311, 312) providing for a probate homestead, was in force. Sections 1 and 4 of the act provide for a homestead consisting of a quantity of land, together with the dwelling-house thereon, not exceeding in value the sum of five thousand dollars. When the widow of Southworth filed her petition for a probate homestead, and after the original order was made granting it, and when the appraisers had segregated and set it apart, she was beyond question entitled to a probate homestead under this act. No objection was raised at that time, and none could be raised, as to the sufficiency of her petition. She was then the widow of Southworth and was residing upon the land in question. The act of 1860 contained no limitation as to the quantity of land that might be segregated and set apart, the only limitation at that time being that the value of the land set apart should not exceed the sum of five thousand dollars. The language of the order was that the homestead "be set apart"; and the effect of such order was to vest title thenceforth in the widow; and in our opinion the order confirming the survey and appraisal merely ascertained and fixed the boundaries to which the original order of the court applied.

Irrespective of this question, and assuming, as counsel contends and as the trial court found, that the final order confirming the report was the one under which title vested, and that it was made under the Probate Act limiting a homestead to the widow, and providing that it should not exceed twenty acres in extent, still the fact that the applicant had ceased to be the widow of Southworth at the time the final order was made, though she was such widow at the time of her application and the making of the original order, and that the quantity of land set apart was an amount in excess of that which the act permitted, cannot at this late date deprive her



of the benefits she received under the decree of the probate court. The order was never appealed from; and it has been held in numerous cases by our supreme court that an order setting apart a homestead is appealable, and that the right to have it reversed for error is lost by failure to appeal. Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings *in rem*; and judgments therein so far as they relate to the disposition of the property of the estate are binding upon the parties interested. (*Kearney v. Kearney*, 72 Cal. 591, [15 Pac. 769].)

The only question to be considered upon the hearing of an application for a probate homestead is, Did the court have authority to determine the subject matter of the controversy and jurisdiction over the thing proceeded against? Jurisdiction is the power to hear and determine, and it does not depend upon the correctness of the decision made. The court having jurisdiction, mere error in its judgment will not vitiate the decree. The court, in the matter of the application for the probate homestead under consideration here, had power to make the order, and its decree can only be reviewed by a direct appeal therefrom. It has accordingly been held that an order setting apart to a widow without limitation a part of a farm as a homestead, which was in fact the separate property of the deceased, is erroneous but not void; and if the time for an appeal from the order has expired and no appeal has been taken, the title to the homestead under the order vests in the widow in fee simple absolute. (*Estate of Bette*, 171 Cal. 583, [153 Pac. 949]; *Gruwell v. Seybolt*, 82 Cal. 7, [22 Pac. 839]; *In re Moore*, 96 Cal. 522, [31 Pac. 584]; *Estate of Huelsman*, 127 Cal. 275, [59 Pac. 776].)

Nor does the fact that error appears upon the face of the decree alter or change the rule; and there is no merit in the contention that the widow was not entitled to a homestead for the reason that the premises out of which it was carved were specifically devised to her for life. (*Estate of Lahiff*, 86 Cal. 151, [24 Pac. 850]; *Estate of Vance*, 100 Cal. 425, [34 Pac. 1087]; *Estate of Firth*, 145 Cal. 236, 239, [78 Pac. 643]; *Estate of Huelsman*, 127 Cal. 275, [59 Pac. 776].) There is nothing in the will of Southworth to show that he intended the specific devise of a life estate to his wife to be in lieu of any rights which she might acquire under the statutes making provision for a probate homestead to her as his widow. The right

of a surviving wife to a probate homestead is an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise (*Estate of Firth*, 145 Cal. 236, [78 Pac. 643]); and the power of Southworth to create a life estate in or to any part of his property was subject and subordinate to the right of the widow to a homestead (*Sulzberger v. Sulzberger*, 50 Cal. 385).

We come now to a consideration of the legal effect of the sales in probate of those portions of the lands in controversy that were sold in payment of debts, consisting of two parcels of the two hundred acre tract, viz., one of 78.57 acres, and the other of 35.50 acres.

The theory of the plaintiffs in attacking these sales is that had the late Mrs. Montague not insisted upon the payment of the family allowance accruing subsequent to her marriage, the sales would have been unnecessary. Assuming this to be true (although the record does not support this contention), no appeal was ever taken from the orders granting the family allowance, or from the orders authorizing or confirming the sales made for the purpose of the payment of debts of the estate, of which the amount due for family allowance was but a part. What we have said concerning the decree setting apart a probate homestead applies with equal force to the decrees confirming the sales. If any errors were committed in the granting of the same, appropriate action should have been taken at the time of their making, and failing in this the effect of the orders cannot now be assailed. (*Estate of Nolan*, 145 Cal. 559, [79 Pac. 428]; *Tobelman v. Hildebrandt*, 72 Cal. 315, [14 Pac. 20].)

The matter of the necessity of the sale was shown in the petition, and such necessity was a matter for the court's determination.

It must be held, therefore, that the title that Mrs. Montague thus acquired to the three hereinbefore mentioned portions of the premises in controversy divested the contingent remaindermen of any interest therein, unless it can be said that such title was founded in fraud and conspiracy, as alleged by the plaintiffs.

The charge of fraud is rested primarily upon the fact that the award of the family allowance to Mrs. Montague was made after her marriage to the defendant Montague. In sup-

port of the charge of fraud and conspiracy it is argued that the record of the administration of the estate of Southworth shows upon its face that the executor, his attorney, and the defendant Montague were all guilty of collusion with the life tenant to defeat the remaindermen, when they recognized her demand for a family allowance after she had ceased to be the widow of Southworth. The fact that the family allowance was kept alive after her marriage to Montague does not tend in itself to prove the fraud and conspiracy claimed, for at that early time no decision had ever been rendered by our supreme court to the effect that an order for the payment of family allowance ceased upon the marriage of the widow. Moreover, as opposed to the charge of fraud is the significant fact that the marriage of Mrs. Montague was not concealed from the probate judge making the order. To the contrary, it affirmatively appears that the order was made with full knowledge of this fact, for she is referred to therein as the wife of Montague. As we have previously indicated, no witnesses were called to substantiate the charge of fraud or conspiracy set forth in the plaintiff's complaint; and if there is any foundation for those charges and the findings of the court supporting them, it must appear from the probate records of the Southworth estate which are before us. No other evidence of any kind of fraud was offered to show that either the widow or her attorney ever willfully, wrongfully, and fraudulently conspired to acquire title in fee simple to the lands in controversy. Alleged suspicious circumstances without number appearing, it is claimed, upon the face of the probate record and showing fraud, are enumerated in the briefs of counsel for the plaintiffs, and from these it is argued that fraud is conclusively shown. But fraud when charged must be clearly proven; and we see no force in the deductions made by counsel for plaintiffs from the record of the administration of the estate of Southworth, and in our opinion no foundation exists for the inferences drawn therefrom and upon which the charges of fraud and conspiracy are based. It would be an idle, endless, and ineffectual task to narrate in detail and then discuss the many circumstances relied upon to support the charge of fraud and conspiracy. It will suffice to say that beyond any question, as the widow of Southworth, Mrs. Montague cannot be condemned for procuring unto herself every benefit and protection from the estate of Southworth which

the law gave her. This she had a perfect legal right to do. Both a widow's claim to family allowance and a probate homestead are strongly favored in our law. (*In re Lux*, 100 Cal. 593, 603, [35 Pac. 341]; *Estate of Welch*, 106 Cal. 427, [39 Pac. 805]; *Estate of Cowell*, 164 Cal. 636, [130 Pac. 209].) The estate originally left by Southworth was not a large one, and indeed it appeared to be hopelessly insolvent. Under these circumstances it may be suggested that very little motive existed for the perpetration of the fraud and conspiracy charged to the defendant Montague and his wife. Especially is this so when we stop to consider that the interest of the parties against whom the alleged fraud was directed could never receive any benefit until the death of Mrs. Montague, who was at that time a young woman, and then only in the event that she should die childless.

In short, we are of the opinion that the finding of the trial court, that the defendant Montague and others fraudulently conspired to defeat the interest of the remaindermen, is without support in the evidence. Moreover the fraud charged was based upon facts that are clearly apparent from the record itself and only from the record. This is not the character of fraud which will justify the setting aside of judgments and decrees. It was not extrinsic or collateral to the questions examined or determined upon the hearing of the petitions for the orders. A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined by such court. (*Hanley v. Hanley*, 114 Cal. 693, [46 Pac. 786].) Instancing what extrinsic fraud consists of, our supreme court has said that it may result from (1) keeping the unsuccessful party away from the court by a false promise of a compromise; (2) purposely keeping him in ignorance of the suit; (3) where an attorney fraudulently pretends to represent a party and connives at his defeat; and (4) being regularly employed, corruptly sells out his client's interest (*Pico v. Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537]). In instances of this character the defrauded party is prevented by the act of his adversary from having a trial. No such situation was presented by the evidence in the present case. The claim of fraud now urged could and should have

been litigated at the time of the hearing of the various decrees in controversy.

Equally untenable is the claim of plaintiffs that the devise of a life estate in the premises was a specific devise, and that therefore Mrs. Montague was estopped—and likewise the defendant Montague—from claiming that after she took a life estate in any part of the premises under the will she acquired the fee in the area segregated as a homestead against the will. Neither by the terms of the will nor otherwise was the widow expressly put to an election, nor can any direction to make an election be implied therefrom. In the very recent case of the *Estate of Whitney*, 171 Cal. 750, [154 Pac. 855], it is said: "The right of testamentary disposition and the right of beneficiaries to take under the will are alike statutory, and are both subject to the power of the court having jurisdiction of the estate to make a provision for the support of the widow (or minor children) out of the estate (*Estate of Bump*, 152 Cal. 274, [92 Pac. 643]). A family allowance is in this respect analogous to a probate homestead, which, it has been held, may be ordered out of property specifically devised (*Estate of Huelsman*, 127 Cal. 275, [59 Pac. 776])." While this case recognizes the right of a testator to so draw his will as to put his widow to an election, no such right was attempted to be exercised in the will under consideration here. Moreover, there is no evidence in the record that the widow ever entered into possession of any part of the premises as a life tenant under the will or that she held possession as such. If she was put to an election under the law, she certainly exercised it and took under the law and not under the will immediately following the death of her husband, when she instituted proceedings to gain a homestead and secure a family allowance. The fact that the remaining portion of the tract, consisting of thirty-two and one-half acres, was attempted to be distributed to her under what seems to be conceded a void decree of distribution, does not operate as an estoppel against her. At that time, according to the testimony, she believed that she had acquired the entire premises under the homestead and the decree of sale. The finding that she took a portion of the premises under the will is contrary to and inconsistent with the evidence adduced upon the entire case.

The conclusion which we have reached upon the question immediately under consideration renders it unnecessary to dis-

cuss and decide the question of the statute of limitations or the doctrine of laches; and likewise and for the same reason we are not called upon to discuss and decide the question of the right of succession to the conventional homestead alleged to exist in favor of the widow as surviving wife of Southworth.

From what we have said it follows that the plaintiffs as a matter of law have no title to or interest in any part of the land in suit except the thirty-two and one-half acres to which disclaimer is made.

The judgment and order appealed from are reversed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 18, 1916.

---

[Crim. No. 591. First Appellate District.—March 22, 1916.]

THE PEOPLE, Respondent, v. VERNON W. FOWLER,  
Appellant.

**CRIMINAL LAW—MURDER—SUPPORT OF VERDICT.**—In a prosecution for murder, where the testimony upon which the defendant was convicted was circumstantial, the judgment of conviction will not be set aside on appeal, where it cannot be said that there was not evidence to sustain the verdict, even though it cannot be said that a strong and convincing case was made out against the defendant.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Franklin A. Griffin, Judge.

The facts are stated in the opinion of the court.

McClellan & McClellan, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**KERRIGAN, J.**—The defendant was charged with the crime of murder, alleged to have been committed on the

eighteenth day of December, 1914, one William Fassett being the victim. The defendant was tried, found guilty of murder in the first degree with the punishment fixed at life imprisonment, and he was sentenced accordingly. This appeal is from the order denying his motion for a new trial and from the judgment.

No complaint is made as to any of the rulings of the trial court on the admission or rejection of evidence. The defendant did not take the witness-stand himself, nor was any evidence introduced in his behalf. The sole point relied upon for a reversal of the judgment and order is the alleged insufficiency of the evidence to sustain the verdict.

On the evening of December 18, 1914, three men, engaged in burglarizing a house situated on Oak Street, between Ashbury and Clayton Streets, in San Francisco, during the absence of the occupants, were interrupted by their return, and, in the excitement which ensued, one of the latter was shot and killed by the burglars, who immediately fled and were seen to run into what is known as the Panhandle, a portion of Golden Gate Park covered with trees and shrubbery. Soon thereafter two men were seen to emerge from the opposite side of the Panhandle and disappear, followed in a few moments by a third man, the latter without a hat. While engaged in the burglary the men concealed their features with pillow slips, and consequently the occupants of the house were unable to describe or identify the men. One witness, however, was able to testify that the eyes of one of the intruders were like the eyes of the defendant, in that they were bright and had an expression of positiveness of character. The principal circumstance relied upon by the prosecution to connect the defendant with the homicide is that a few hours after its commission a brown hat, bearing on the sweatband thereof the defendant's initials, was found at a place about where the three men crossed the Panhandle, and the prosecution advance the theory that in running across that portion of the park the defendant's hat was knocked from his head by a limb of a tree, and that in stopping to pick it up he became separated from his companions. Other evidence in the case is as follows: Vincent P. McDevitt lived on Fell Street facing the Park Panhandle, and about opposite to the house on Oak Street where the homicide was committed. Hearing a pistol shot he went to the front porch of his residence, and in a few

moments noticed a man emerging from the shrubbery of the Panhandle at a point about one hundred feet easterly from his residence, and who walked by his house, the witness observing him from his porch, which was about eight feet above the sidewalk. As he was passing, McDevitt inquired of him what had happened, and the hatless stranger replied, "I think it was a burglary." Comparing the appearance of this man with the defendant, McDevitt testified that he had dark hair and was baldheaded, and referring to the defendant added, "This man is dark-haired and baldheaded and they have the same resemblance in common." He further described the man he saw as between five feet seven or eight inches in height, and quite but not so very stout—which description seems to fit the defendant. Finally McDevitt testified that he could name nobody in the world that looked as much like the defendant as the hatless stranger he saw that night.

Another witness, Lillie Lark, who resided in the neighborhood of Fell Street, and apparently an unwilling witness, testified that she heard a shot on the night in question, and went to the front steps to see what had happened; she saw a man cut across the park almost opposite her residence, and when he got over to her side of the street she spoke to him, asking, "What is the matter?" The man replied that it seemed to be a hold-up. He had no hat on.

Although none of the residents of the burglarized house smoked, the police officer who examined the premises immediately after the homicide found a cigarette butt there, and an expert chemist called by the people testified that the tobacco found therein was similar to the tobacco found on the person of the defendant when he surrendered himself to the police authorities.

A police officer examined the Panhandle in the vicinity of where the three men crossed it a short time after their passage, and found three sets of footprints not on any of the regular paths traversing it, and along the tracks thus made gathered up pieces of string and a pair of gloves identified as having been taken from the burglarized house. The hat was also found near these tracks. One set of these footprints was found to be about the size of the defendant's shoes. Three days after the murder the defendant voluntarily entered police headquarters and announced who he was. On being shown the brown hat he admitted it was his. He told the



officers that on reading the newspapers containing some details surrounding the murder he became excited, left his hotel on Saturday, December 19th, the day after its commission, rode to within a short distance of San Mateo, and stopped for the night in a small uninhabited shack; that on Sunday he went to San Mateo and that night again returned to the shack, and that on Monday morning he walked to San Francisco, boarded a Mission Street car near Silver Avenue and rode to police headquarters. The officers noticed at this time that the defendant's shoes were neither muddy nor wet, although it had been raining. The officers requested the defendant to take them to the shack described, but he refused to do so. In his voluntary statement he also told the police officers that he had discarded the old brown hat found in the Panhandle ten days before the homicide, giving two different versions of how he disposed of it. His statement as to the time he disposed of this hat was contradicted by the manager of the hotel where he lived, who testified that the defendant wore the hat in question up to within two days of the murder. On being asked where he procured the hat he was wearing when he entered the police headquarters the defendant replied that he had bought it "ten or twelve days ago for \$2.50 at Wolff's hat store on Grant Avenue," but was unable to locate the store within three or four blocks of its situation; and when asked on which side of Grant Avenue the store stood he refused to reply. Wolff, the hatter, called as a witness, testified that he had not carried in stock a hat such as the defendant referred to for six months, and that he had never charged more than \$1.50 for hats sold by him.

For the purpose, doubtless, of showing that the brown hat had not been lying in the Panhandle prior to the evening of December 18th, the prosecution called a witness who, without objection, qualified as an expert in such matters; and he testified that he could tell from an examination of the sweatband of the hat approximately how recently it had been worn; and that, on the nineteenth day of December, when he examined the hat found in the Panhandle, it had, in his opinion, been worn within twenty-four hours of that time. Finally, on the cross-examination of the witnesses for the prosecution by the attorneys who at that time represented the defendant, it was shown that the defendant had theretofore been convicted of a felony and that he was a user of morphine.

From the evidence in the record it would appear that the man who was seen to come out of the Fell Street side of the Panhandle was one of the three men who had been engaged in the burglary on Oak Street, and that in passing through that part of the park he had lost his hat. That man and the defendant appeared to the witness McDevitt to be one and the same. It also appears that the hatless man was cool and collected. If connected with the homicide, by thus leaving the scene of the crime leisurely he adopted the best method for disarming suspicion, and showed himself an experienced criminal. The defendant in this case was an ex-convict. When the defendant read in the San Francisco newspapers that his hat had been found near the course taken by the escaping criminals, and learned that the police were looking for him, it may be that he did not go to San Mateo, for he was seen in San Francisco after the time that he said he left there, and he refused to point out to the police officers the shack in which, according to his account, he slept for two nights, and the condition of his shoes indicated that he had not, as claimed by him, walked from there into San Francisco. If in fact he did not go into San Mateo County, his narrative of his doings there may have been concocted for the purpose of protecting friends who were helping to conceal him, among whom may have been his associates of the night of the 18th. If, on the other hand, his statement that he visited San Mateo County be true, his going there may be regarded as flight from the scene of the crime, which the jury had the right to consider as evidence of guilt. In any event, the defendant was aware that the police were searching for him, and probably realized that on account of his past record they were well equipped to capture him, and concluded that the best way to escape arrest and prosecution was by walking right into the police headquarters, admitting that the hat found was his, but to claim that he had thrown it away ten days before the homicide. He told two different stories of how he had disposed of this hat, and he was contradicted by his landlady as to the time he had parted with its possession. There is also a conflict between him and the witness Wolff, the latter, as to when he bought the new hat, and as to how much he paid for it. The tobacco in the cigarette left on the burglarized premises was like the tobacco found in the defendant's possession, and it was a kind of tobacco seldom used in

cigarettes. It is also significant that in his statement to the police the defendant did not disclose his whereabouts on the night of the murder. The testimony upon which he was convicted was circumstantial; and while we cannot say that a strong and convincing case was made out against him, we are equally unable to say that there is not evidence to sustain the verdict—in which event only would we be warranted in setting aside the judgment of conviction. (*People v. Meyers*, 5 Cal. App. 674, [91 Pac. 167].)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 18, 1916.

---

[Crim. No. 490. Second Appellate District.—March 22, 1916.]

In re CLARA VIOLA WILLIS, on Habeas Corpus.

JUVENILE COURT LAW — JURISDICTION — CONSTITUTIONAL LAW.— Under the terms of the Juvenile Act, as its text stood both in the year 1909 (Stats. 1909, p. 213) and as amended in 1915 (Stats. 1915, p. 1225), the juvenile court is given jurisdiction over all "persons" under the age of twenty-one years, irrespective of their minority; and there is no constitutional restriction which deprives the legislature of the right to confer jurisdiction upon the juvenile court in the manner and form described by the act.

APPLICATION originally made in the District Court for the Second Appellate District for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Louis Kleindienst, for Petitioner.

Thomas Lee Woolwine, District Attorney, and H. S. G. McCartney, Deputy District Attorney, for Respondent.

JAMES, J.—A writ of *habeas corpus* was issued herein on petition of Clara Viola Willis. In August, 1915, petitioner,

then being seventeen years of age, was adjudged by the superior court of the county of Los Angeles, sitting as a juvenile court, to be a delinquent person, the particular charge being that she was guilty of vagrancy as that crime is defined in some of the provisions of section 647 of the Penal Code. At the time of this adjudication petitioner was a married woman. A final order in the matter was made on the tenth day of February, 1916, when the juvenile court ordered that petitioner be placed under probation until she arrived at the age of twenty-one years, or until further order of court, and that she be allowed to reside with her mother under the supervision of a probationary officer. On the nineteenth day of February, 1916, petitioner became of the age of eighteen years. It was set out in the return that while a ward of the juvenile court petitioner had, without the consent of the court, but with the consent of her mother, married one Willis, and had deserted said Willis after living with him but a "short" period of time. The particular ground upon which petitioner asks to be discharged is that the juvenile court has no jurisdiction over persons other than minors and unmarried infants. Under the terms of the Juvenile Act, as its text stood both in the year 1909 (Stats. 1909, p. 213), and as amended in 1915 (Stats. 1915, p. 1225), the juvenile court is given jurisdiction over all "persons" under the age of twenty-one years, irrespective of the question of their minority. We can find no authority which deprives the legislature of the right to confer jurisdiction upon the juvenile court in the manner and form described by the act. In order to sustain the contention of petitioner the court would be compelled to conclude that it was only competent for the legislature to vest jurisdiction in the juvenile court over minors. There is no constitutional limitation that our attention has been called to which so restricts the legislative power.

The writ is discharged and petitioner remanded.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1691. First Appellate District.—March 23, 1916.]

**LATHIA W. WILSON, Appellant, v. DISTRICT COUNCIL  
OF SHEET METAL WORKERS et al., Respondents.**

**FRATERNAL INSURANCE LAW—RIGHT TO DEATH BENEFIT—CONSTRUCTION OF RULES AND REGULATIONS.**—Where the rules and regulations of an international labor organization, and of the local union to whose general laws it is subject, upon the subject of dues, delinquencies, and suspensions from membership, provide that members shall not be in arrears until three months' dues are owing, when they shall be suspended, and that the secretary shall notify all members when thus delinquent, and that the local union shall keep members in good standing until suspended, it is necessary in order to deprive such a member of that good standing in his local union which would debar his widow or other beneficiary of the right to receive the death benefit upon his decease, that affirmative action amounting to suspension shall be taken by the local union of which he was a member, and, in the absence of such action, he is entitled to be reported as a member in good standing, and entitled to have the death benefit paid upon his death to his widow or other beneficiary.

**APPEAL** from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

W. B. Rinehart, for Appellant.

Cleveland L. Dam, and George Appell, for Respondents.

**RICHARDS, J.**—This is an appeal by the plaintiff in an action brought to recover from the defendants the sum of eight hundred dollars, alleged to be due as a death benefit payable to the plaintiff upon the death of her husband, by virtue of his membership in the two organizations made parties defendant in this action.

The facts are practically undisputed and may be summarized as follows: Local Union No. 216 of the Amalgamated Sheet Metal Workers' International Alliance is an unincorporated association of a number of craftsmen, and is, as its name indicates, a branch of the international organization, to whose general laws it is subject, and which has for its principal purpose the securing of those rights and advantages

for its members for the better maintenance of which similar labor organizations are created. The defendant, District Council of Sheet Metal Workers of the state of California, is also an unincorporated association, called into being by the several local unions of the general order within a certain district, and having for its chief object the collection and payment of death benefits to the widows or other beneficiaries of deceased members of the several local unions comprising its membership within the designated district. By the rules and regulations of this district organization the funds from which its death benefits were to be paid were raised and repleted by means of assessments of the members of the local unions to the extent of one dollar for each member "in good standing," and who had been such member "in good standing" for the period of six months prior to the death of the member for whose benefit the assessment was to be paid. The names of such members as were in good standing, and entitled to these benefits, were to be forwarded from time to time by the financial secretary of the local union to the secretary of the district council; upon the death of any member of the local union entitled to a death benefit the said financial secretary of the local union was to communicate with the secretary of the district council, stating that the deceased member was in good standing for the period of six consecutive months prior to his death, whereupon the treasurer of the district council was to forward to the said secretary of the local union the amount of the death benefit which was to be paid over to the widow or other beneficiaries of the deceased member.

Charles Wilson, the deceased husband of the plaintiff, became a member of local Union No. 216 on March 25, 1912, and remained a member thereof until his death on December 4, 1912. He had not been very regular in the payment of his dues and assessments, but the record shows that from time to time he paid varying amounts on account thereof, and that during the month of October he had fully paid up his obligations to the order, including his dues for that month. The record also affirmatively shows that although at times delinquent in respect to those obligations, he had never been suspended nor in any manner called to account for his arrears, nor had his name ever been reported to the district council as a member not in good standing in his local union, but on

the contrary, had been reported thereto as in good standing.

The rules and regulations of the International Alliance of which the local union is a member, upon the subject of dues, delinquencies, and suspensions, contain the following provisions:

"Art. VIII, sec. 4. All members shall pay dues in advance, and are not in arrears until the end of the current quarter.

"Art. X, sec. 1. Members may be admitted into the hall until they are three months in arrears. When over three months in arrears they shall be suspended, and must pay all arrears and receive a clear card before being admitted.

"Art. II, sec. 6. The financial secretary . . . shall keep a correct account of each member, with full name and residence, and shall notify all members three months in arrears. He shall furnish the general secretary-treasurer a list of all expelled or suspended members."

The by-laws of Local Union No. 216 contain the following provisions:

"Art. V, sec. 2. Members owing this union three months dues shall be considered delinquent.

"Sec. 14. Local 216 shall pay all members death benefit at time of each report of death, keeping him in good standing for his insurance as long as he has not been suspended, and same must be charged to brother for dues by local 216, and should be good as long as he is not suspended."

It would seem to be very clear from a reading of these provisions of the governing rules of the International Alliance, and of the local union, that the mere delinquency of a member of the latter in the matter of keeping promptly paid his dues and assessments would not be sufficient to render him a member not in good standing; but that in order to deprive such member of that good standing in his local union which would debar his widow, or other beneficiaries, of the right to receive the death benefit upon his decease, it was necessary that affirmative action amounting to his suspension should be taken by the local union of which he was a member, and that in the absence of such action he was entitled to be reported to the district council as a member in good standing, and hence according to its rules entitled to have its death benefit paid upon his decease to his widow or other beneficiaries. This was apparently the construction which the officers of the local union had placed upon their rules and regulations prior to

Mr. Wilson's death according to the evidence of its secretary. And it may be said that it is a rule of justice and reason as applicable to such organizations wherein the fact of a delinquency in dues might often arise out of the very conditions which would have placed the delinquent member in need of its beneficial objects and aids. The provision in the rules of the local union to the effect that the death benefit assessments, if not paid by a member, should be kept paid up by the union itself so as to keep such delinquent member in good standing with the district council so long as he had not been suspended by his local union, is exactly in line with this interpretation of the rules and regulations of the International Alliance and of Local Union No. 216.

Applying these rules and regulations as thus interpreted to the case in hand, it must be concluded that at the time of his death the plaintiff's husband was a member of Local Union No. 216 in good standing, and as such was entitled to have his widow receive from the District Council, through the treasurer of said local union, the death benefit for which she was compelled to bring this action. The trial court, in denying the plaintiff this right, and in rendering its judgment in the defendant's favor, was in error.

The distinction to be drawn between the cases cited by respondent's counsel and the case at bar is the obvious one that in none of those cases was the suspension of a member made a prerequisite to the deprivation of his rights as a member in good standing in his local union.

Judgment reversed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 22, 1916.

80 Cal. App.—18

[Civ. No. 1758. First Appellate District.—March 24, 1916.]

**J. B. MORRELL et al., Respondents, v. SAN TOMAS DRYING AND PACKING COMPANY (a Corporation), Defendant and Appellant; BALFOUR GUTHRIE AND COMPANY (a Corporation), Defendant.**

**SALE—PRUNE CROP—PERFORMANCE—REJECTION OF PORTION OF CROP.—**

The purchaser under a contract for the sale and delivery of a crop of dried prunes, which had already received and accepted the larger portion of the crop, and requested an extension of time for the delivery of the remainder, which was accorded to it by the seller only after the manager of the purchaser had personally inspected such remainder and expressed satisfaction therewith, with the exception of a single and severable ton, which he also expressed willingness to accept if put in condition, is not justified in rejecting the whole of such remainder on the ground that the excepted ton had not been put in proper condition, but should have confined such rejection to such ton and accepted the prunes which were up to the contract requirement.

**APPEAL** from an order of the Superior Court of Santa Clara County denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Beggs & McComish, for Appellant.

S. G. Tompkins, for Respondents.

**KERRIGAN, J.**—This is an appeal from an order denying a new trial in an action for damages for the alleged failure of the defendant, San Tomas Drying and Packing Company, to accept and pay for a certain lot of prunes under the terms of a written contract between the parties to the action.

This case was before this court upon a former appeal, the decision of which is reported in 13 Cal. App. 305, [109 Pac. 632], and in which the facts of the case are quite fully and correctly set forth. Upon the retrial of the cause the errors of pleading and attempted proofs adverted to in that decision were in the main corrected or avoided by the plaintiffs; and, while the appellant still contends that the action was prematurely brought, the adverse views of this court upon the former

appeal as to that issue must be adhered to as the law of the case.

As to the appellant's contention that the rejected prunes did not meet in point of quality the requirements of the contract, and that for that reason they were entitled to reject them as a whole when offered as a whole, the evidence shows the following to be the facts: The prunes were grown upon several orchards owned or leased by the plaintiffs in the vicinity of Wright's station in the Santa Cruz Mountains during the season of 1907. The contract for the purchase by the defendant of the crop when dried by the plaintiffs was entered into in the month of July of that year while the prunes were still upon the trees. Such contract requires "All fruit to be sound and merchantable and well dried, free from slab, of choice quality, and delivered f. o. b. packing house situated on the Infirmary road, Santa Clara county, California; delivery to be made as directed, final delivery before November 30, 1907." The total amount of prunes grown was, when dried, 172,698 pounds, and of this amount 134,132 pounds were delivered to and accepted by the defendant within the time fixed by the contract. The reason the remainder of the crop, amounting to 38,566 pounds, was not also offered for acceptance during said time was, as testified by the plaintiffs, that the defendant requested that such further delivery be delayed for the reason that its bins were full. In accordance with this request the time for shipment and receipt of the remainder of the prunes was extended until January 1, 1908, when a further extension was requested by the defendant, but before granting it the plaintiffs insisted that the defendant's manager should inspect this remainder of the prunes upon plaintiffs' premises in order, apparently, that they might be assured that the prunes would be accepted when finally delivered. The defendant's manager accordingly went during December, 1907, to the plaintiffs' premises, and there fully examined the undelivered fruit, and, after doing so, said that the prunes were all right with the exception of one separate pile of about a ton, which contained a few soft prunes; and he then stated that if the soft ones were in condition when he received the balance of them he would accept them also. On January 14, 1908, the defendant requested that the time limit of plaintiffs' delivery under the contract be further extended to May 1, 1908, for the reason evidently that its bins were

still overcrowded. In its letter requesting such extension the following language was used: "Regarding the pile I expressed my doubts about as to its condition, same will be accepted subject to their being in suitable condition when the time comes for delivery." The plaintiffs upon receipt of this letter put the ton of prunes which had been objected to through an evaporating process, that being the only method of further drying them available at that season of the year, and thereafter and in the month of April, 1908, tendered for delivery the aforesaid remainder of his crop as a whole. The defendant refused to accept the prunes as a whole, but made no offer to accept less than the whole or to take the admittedly good prunes if the one ton of evaporated prunes were eliminated from the lot. The plaintiff thereupon sold the entire lot at auction in the nearest available market, and then brought suit to recover the difference between the proceeds of such sale and the contract price.

The foregoing statement of the record impels us to the conclusion that while it was the right and duty of the plaintiffs to make a tender of this remainder of their crop of prunes for delivery to the defendant as a whole; and while it would have been the right of the defendant, had all of the prunes been up to the standard specified in the contract, to require such delivery of the whole of this remainder of the prunes, and to refuse to accept them unless thus offered as a whole, it was not the right of the defendant to refuse to accept any of those prunes, for the reason that the one ton to which he had formerly objected were not in proper condition. At the time of the inspection of these prunes by the defendant's manager in December, 1907, and after his objection to this single and severable small lot of them, he plainly led the plaintiffs to believe that the remainder of their prunes, with the exception of this single ton, would be received and accepted whenever offered for delivery; and the express intimation of his letter of January 14, 1908, is to the same effect. Under these circumstances, having already received and accepted the larger portion of the plaintiffs' crop when delivered in November, and having requested the extension of time for the delivery of the remainder of the crop, and having been accorded such extension only after its manager had personally inspected the remainder of the crop, and been satisfied with all of it except the single ton, and having suggested that the latter, if put in

condition by the plaintiffs, would also be accepted, and the plaintiffs having then and there and at that season of the year adopted the only available method of putting such single ton of prunes in condition, and having apparently claimed and believed that they had done so, and then tendered this remainder of their prunes for delivery as a whole, the defendant should have offered to accept all of the prunes which were admittedly up to the contract requirement, and should have confined its rejection to the single ton which, it still claimed, was not in like condition, and which was separate and severable from the rest. In other words, having already received and accepted the larger portion of these prunes, and having already expressed itself satisfied with all of the remainder with the exception of the single and severable ton, and having stated that these, when put in condition, would be accepted also, it was the duty of the defendant to have confined its rejection of the plaintiffs' final tender to the single, severable, small lot, of evaporated prunes, and by so doing have enabled the plaintiffs, by delivering the rest, to limit the dispute between them to the only portion of these prunes to which the defendant had a valid objection. Not having done this the defendant is in no position to complain because the plaintiffs acted upon its unqualified and unjustifiable rejection of the remainder of their prunes as a whole, and took the only method of ascertaining their damage which is provided by law.

The other contentions of the defendant we find to be without merit.

The order is affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1692. Second Appellate District.—March 24, 1916.]

R. C. PORTER, Respondent, v. GENERAL ACCIDENT,  
FIRE AND LIFE ASSURANCE CORPORATION,  
LIMITED (a Corporation), Appellant.

**INSURANCE LAW—APPLICATION FOR ACCIDENT POLICY—FAILURE TO DISCLOSE EYE AFFLICTION—KNOWLEDGE OF AGENT—LIABILITY OF COMPANY.**—An insurance company is not liable upon a policy of accident insurance for an illness of the insured consisting principally of an infection of the eye described as purulent conjunctivitis, where he, in his written application for the policy, stated that he had never suffered any injury to the sight of either eye, and that he had not been disabled by accident or illness during the five years preceding the time of making the application, whereas he had in fact suffered an illness of such character and of such seriousness that required the services of a specialist within the five-year period, notwithstanding that the agent of the company, who had only authority to receive and forward the application, countersign and deliver a policy, collect the premium and receive and forward the proofs of claim, was informed of such illness at the time of the signing of the application by the insured.

**ID.—AUTHORITY OF INSURANCE AGENTS.**—One who has authority to take applications, receive and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company.

**ID.—POWERS OF GENERAL AGENT.**—A general agent, in a strict legal sense, is one who has all the powers of his principal, as to the business in which he is engaged—an extent of authority which is not often conferred in insurance; in that business an agent is termed a general agent rather with reference to geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and subagents which a local agent cannot.

**ID.—LIMITATION OF POWERS OF AGENT.**—An insurance company, like any other principal, has authority to limit powers of its agent, and where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes a contract between him and the company and he is charged with knowledge of its terms; among others, the limitations upon the power of the agent of the company.

**ID.—WAIVER OF CONDITIONS AND FORFEITURES—AUTHORITY OF AGENT.**—The authority of an agent to effect a waiver in the face of a limita-

tion denying his power to waive warranties or conditions is not vested in every agent; unless such authority be given to some particular agent to do so, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures.

**ID.—APPLICATION FOR POLICY—STATEMENTS OF APPLICANT.**—Where the applicant for an insurance policy signs an application certifying to the truth of the statements therein contained material to the risk and delivers it to the company, those statements become his solemn representations; and even though filled out by an agent upon a form furnished by the company, they are (in the absence of fraud) of the same binding force upon the applicant as though he had himself written them out in longhand and signed them.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

Herbert W. Kidd, and Perry F. Backus, for Appellant.

T. A. Williams, for Respondent.

**CONREY, P. J.**—The defendant appeals from a judgment which awarded to plaintiff the sum of \$560 allowed as compensation for a four-months' period of disability of the plaintiff, found to have resulted from an accident covered by the terms of an insurance policy issued by the defendant to the plaintiff.

At a time prior to the issuance of the policy, plaintiff signed an application to the defendant for a policy of insurance and delivered it at Dallas, Texas, to J. H. Wilson, an agent of the defendant. The application was upon a form the blanks in which were filled in writing by the agent, the information being furnished by the plaintiff. A portion of the application reads as follows:

“(C) *I have never been ruptured or otherwise injured or suffered the loss of a limb or the sight of either eye.* (D) *My hearing or vision is not impaired.* (E) *I have not had any medical or surgical treatment during the past five years, except as here stated. No exceptions.*

“*I am not subject to, do not now have, nor have I ever had fits of any kind, vertigo, hernia, paralysis, rheumatism, sciatica, lumbago, nor any disease or infirmity, mental, physi-*

cal, nervous, venereal, chronic or inherited, except as here stated. No exceptions.

*"I understand and agree that the insurance is not effective until the policy has actually been issued by the company and the premium paid, that the company is not bound by any knowledge of or statements made by or to any agent unless written hereon. I further agree to accept the policy subject to all its conditions and pay the monthly premium of two dollars in advance without notice."*

A policy bearing date September 4, 1908, was thereafter issued pursuant to this application. It contains, among other things, the following terms: ". . . General Accident, Fire & Life Assurance Corp., Ltd., of Perth, Scotland. Kelly & Norie-Miller, United States managers. United States offices, 55 John street, New York. (Hereinafter called the company.)

"In consideration of the premium, and the statements in the application for this policy, a copy of which is attached hereto and made a part hereof, which statements the assured, on the acceptance of this policy, warrants to be true, does hereby insure R. C. Porter . . . subject to all conditions and limitations hereinafter contained, . . . against accidental death and dismemberment . . . and disability due to either accident or illness, as hereinafter respectively defined, limited and specified.

"(R) This policy, with a copy of the application therefor signed by the assured, and any riders or indorsements signed by or on behalf of the United States managers and indorsed hereon or attached hereto shall constitute the entire contract of insurance except only as the same may be affected by any table of rates and classification of risks filed prior to the issuance of this policy with the insurance department of the state in which it is issued or delivered, and no statement made by the assured not incorporated in or indorsed on this policy shall avoid it or be used in evidence, and no provision of the charter, constitution or by-laws of the company shall be used in defense of any claim arising under this policy. *No agent has authority to change this policy or waive any of its provisions, and no assignment, change or waiver hereof shall be valid unless agreed to in writing by or on behalf of the United States managers of the company and indorsed hereon.*

"In witness whereof, the General Accident, Fire and Life Assurance Corporation, Limited, by its United States man-

agers, has executed and attested these presents, but this policy shall not be valid unless countersigned by the duly authorized representatives of the company.

"The premium on this policy is two dollars per month. This policy is dated the 4th day of September, 1908. Countersigned at Dallas, Texas, this 4th day of September, 1908. J. H. Wilson, Authorized and Commissioned Representative. Kelly & Norie-Miller, United States Managers."

It is undisputed that the foregoing policy was in force during the period of time for which compensation has been awarded by the judgment herein; unless it be held that the validity of the policy was affected by an alleged breach of warranty on the part of plaintiff in that his application for the policy contained certain misrepresentations of fact. The defendant by its answer alleged that the statements contained in the application were false in certain particulars and by the plaintiff were known to be false; and especially that prior to the making of said application for insurance, plaintiff had suffered for many years with eye trouble, and that prior to the execution by plaintiff of said application, and the issuance of said policy of insurance, plaintiff had suffered for many years from defective vision. Defendant further alleged that each of the representations so made was relied upon, and the policy issued by the defendant by reason of said statements contained in the application and in full reliance thereon and not otherwise.

The disability for which plaintiff claims compensation began on or about the fourteenth day of July, 1912. In presenting to defendant his proofs of claim, and in his complaint in this action until it was amended at the close of the trial, the claim was based upon alleged illness and not upon the occurrence of any accident. This illness consisted principally in an infection of the left eye, and was described as purulent conjunctivitis. Notwithstanding the representation in the application for insurance that the applicant had never suffered any injury to the sight of either eye, and that he had not been disabled by accident or illness during the five years preceding the time of making the application, it is admitted by the plaintiff in his testimony, and in the proofs of claim submitted by him, that these representations were not true. In a letter written by plaintiff to the defendant, under date of November 11, 1912, he stated that, about fifteen years before that date, a

broken part of a dental instrument had been left in one of his eye teeth, which affected the nerve of the tooth extending up to the eye, and he had not discovered the presence of the piece of metal in this tooth until January or February, 1912, when the tooth was extracted. He said: "This had affected the nerve of my tooth extending up to the eye, and the dentist and the specialist then declared to me that the trouble which I suffered with about eight years ago was caused by this broken instrument in my tooth." In an earlier part of the letter, he referred to the former trouble with his eye as follows: "I had a former attack of my eye about seven or eight years ago, and the trouble I had then was of an entirely different nature from the attack which I have recently suffered with. The specialist at that time could give no reason for the trouble which I was suffering with." Thus it is definitely admitted that less than five years before applying for this policy the plaintiff had suffered an illness pertaining to the left eye, and of such seriousness that for that trouble he consulted or was treated by a specialist. With this same letter the plaintiff forwarded to the defendant two certificates of physicians, in one of which it was stated that the claimant "had similar attacks several years ago"; and the other referred to a similar disability as occurring about "seven years ago." The plaintiff further admitted that at that time his eye was treated daily for several weeks, by a physician.

On behalf of respondent it is contended that, while the application was being prepared, he stated to the agent Wilson the facts concerning his former trouble with his left eye; that the agent omitted to include those facts while filling out the application; and that the relation of Wilson to the company was that of a general agent whose knowledge of the facts was binding upon the company, notwithstanding the defect in the written application.

In its findings the court below stated the facts in accordance with this contention, by finding: "That the defendant delivered said policy and accepted the premiums from the plaintiff with full knowledge of all medical or surgical treatment received by the plaintiff for more than five years prior to the issuance and delivery of said contract or policy; that the defendant likewise at said time had full knowledge of any real or pretended impairment of the plaintiff's vision, and being fully advised, itself filled out the application for the

said contract or policy and delivered the same and accepted the premiums from the plaintiff thereon."

The evidence is sufficient to show that the actual facts concerning plaintiff's former illnesses and eye trouble were stated by the plaintiff to Wilson at the time of making the application. The sufficiency of the evidence to support the finding, quoted above, therefore turns upon the nature and extent of Wilson's agency and the limitations upon his authority to waive the statement in writing by the plaintiff of facts material to the risk. Although Wilson was designated a general agent, there is no evidence showing any business done by him except at the city of Dallas, and the only services shown to have been performed by him in relation to this policy appear to have consisted in receiving and forwarding the application, countersigning and delivering the policy, collecting the premiums and, four years later, receiving and forwarding the proofs of claim of plaintiff concerning the illness for which, in presenting the proofs of claim, he sought compensation.

"One who has authority to take applications, receive and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company." (May on Insurance, 4th ed., sec. 126a.) "A general agent, in the strict legal sense, is one who has all the powers of his principal as to the business in which he is engaged—an extent of authority not often conferred in insurance. In that business an agent is termed a general agent rather with reference to the geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and subagents, which a local agent cannot." (May on Insurance, sec. 126.) An insurance company, like any other principal, may limit the powers of its agents. (*Iverson v. Metropolitan Ins. Co.*, 151 Cal. 746, [13 L. R. A. (N. S.) 866, 91 Pac. 609].) Where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes the contract between him and the company and he is charged with knowledge of its terms, among others, the limitations upon the power of the agent of the company. The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties

or conditions is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. As to the character of agents authorized to waive such conditions, the rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and to cancel policies. (*Sharman v. Continental Ins. Co.*, 167 Cal. 117, 124, [52 L. R. A. (N. S.) 670, 138 Pac. 708]; *Enos v. Sun Ins. Co.*, 67 Cal. 621, [8 Pac. 379].)

Where the applicant for an insurance policy signs an application certifying to the truth of statements therein contained material to the risk and delivers it to the defendant, those statements become his solemn representations. And even though the statements be filled out by an agent upon a form furnished by the company, they are (at least in the absence of any fraud practiced upon the applicant) of the same binding force upon the applicant as though he had himself written them out in longhand and signed them. (*Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 738, [151 Pac. 159].) "Of course, if the insured stipulate in his application that the insurer shall not be bound by any act done or statement made to or by the agent, not contained in the application, he cannot shelter himself under a plea of equitable estoppel, by reason of the agent's fraud or negligence. The knowledge by the agent of a fact not stated in the application in that case becomes entirely immaterial, unless possibly when the statement of the fact may have been fraudulently prevented by the agent." (May on Insurance, sec. 137.) In the case at bar no question of fraud or lack of good faith on the part of the company is presented. The plaintiff does not even deny that he personally read the application before he signed it. A copy of this application as signed by him was attached to and made part of the policy. "By accepting and retaining the contract without objection plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms." (*Madsen v. Maryland Casualty Co. of Baltimore*, 168 Cal. 204, 206, [42 Pac. 51, 52].) The fact that

the statements contained in the application, and which the evidence in this case shows to have been untrue, were material to the risk and are closely related to the very matter involved in plaintiff's claim herein, is beyond question. The further fact that the insurer exacted and the applicant gave a statement as to previous injuries to his eyes or defects of vision, proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them. (*Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, [151 Pac. 159]; *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, [139 Pac. 242].) "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." (Civ. Code, sec. 2607.) "A breach of warranty, . . . where it is broken in its inception prevents the policy from attaching to the risk." (Civ. Code, sec. 2612.)

This policy, although countersigned and delivered by the agent at Dallas, was in fact issued from the office of the United States managers of the corporation, where the matter of accepting or refusing the application was determined. The recitals in the policy clearly indicate this fact, and there is no evidence or claim to the contrary. The fact that the policy was delivered to plaintiff through the agent to whom it had been sent and was required to be countersigned by him, is not sufficient to give him the general powers of the company in the face of the limitations written into the application and policy. Aside from the plaintiff's testimony that he had truly described his former illnesses to the agent when the application for policy was prepared, it is not claimed that the defendant ever received any information of the former illnesses of plaintiff to which we have referred, until he presented proofs of claim on account of the illness or injury to which this action relates. Upon the facts herein stated, and the law as above set forth, we conclude that the defendant has incurred no liability upon the policy.

Several other questions of some importance are presented in support of the appeal, but in view of our decision upon what we consider the main issue, we deem it unnecessary to discuss other phases of the case.

The judgment is reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 1658. First Appellate District.—March 25, 1916.]

**WICKHAM HAVENS et al., Appellants, v. COUNTY OF ALAMEDA, Respondent.**

**TAXATION—CHURCH PROPERTY—CONSTRUCTION OF CONTRACT OF SALE.—**

Where a contract for the sale of real property belonging to a religious corporation, and used exclusively for religious purposes, provides that the church is to retain the possession of the property for a designated period upon the payment of a stipulated rate of interest upon the paid-up installments of the purchase price in lieu of rent, the beneficial ownership of the property is in the vendee pending the payment of the remainder of the purchase price, and the church's use and occupation is in effect that of a tenant, and consequently the property is not exempt from taxation under the provisions of section 1½ of article XIII of the constitution.

**APPEAL** from a judgment of the Superior Court of Alameda County. Wm. H. Waste, Judge.

The facts are stated in the opinion of the court.

John J. Allen, and H. G. Tardy, for Appellants.

W. H. L. Hynes, District Attorney, W. J. Burpee, and Theodore Wittschen, Deputies District Attorney, for Respondent.

**LENNON, P. J.**—Section 1½ of article XIII of the constitution of California provides that "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship, shall be free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor shall be exempt from taxation."

The plaintiff in this action sought to recover the sum of \$1,683.60 paid under protest to the tax collector of the county of Alameda as state and county taxes for the year 1912, assessed against certain real property, which, it was alleged, was being used at the time of the levy exclusively for religious purposes. The defendant's defense of the action was rested primarily upon the affirmative allegations of its answer to the effect that,

although the property in question was being used exclusively for religious purposes by the First Methodist Episcopal Church of Oakland, nevertheless prior to and at the date of the assessment (Monday, March 12, 1912) the beneficial ownership of the property was, by virtue of a pre-existing executory contract of sale, in the plaintiffs, and that the church's occupation and use of the property was in fact that of a tenant, for which it had agreed to pay and did pay to the plaintiffs a stipulated rental.

The appeal, which is from a judgment entered in favor of the defendant, comes here upon the judgment-roll accompanied by an agreed statement of facts in lieu of formal findings, which shows that the facts of the case upon which the judgment rests are substantially these: The subject matter of the assessment in controversy consisted of certain real property situated in the city of Oakland, upon which there had been erected by the First Methodist Episcopal Church a building which, at the time of the assessment and for a long time prior thereto, had been used by the church exclusively for religious purposes. On the eighteenth day of January, 1911, plaintiffs' assignors entered into an executory contract of purchase and sale with the First Methodist Episcopal Church, by which the former agreed to purchase and the latter agreed to sell the property in question for the sum of two hundred and seventy-five thousand dollars. Said contract, after reciting the terms and conditions upon which the several installments of the purchase price should be paid, provided that "the party of the first part (the Church) is to have full and exclusive possession and enjoyment of all of the above described real property and premises up to and until the 1st day of April, 1912, . . . without paying any rent or charge therefor except as herein provided, and that said party of the first part, in consideration thereof and of the covenants and agreements on the part of the said party of the second part herein contained, does hereby agree to pay to said party of the second part, his heirs and assigns, on the 1st day of April, 1912, interest at the rate of four per cent per annum on all of the aforesaid payments from the date when the same are made to the 31st day of March, 1912."

The only point made in support of the appeal is that the judgment is not supported by the facts found in the agreed statement; and, in this behalf, it is conceded that the judg-

ment must stand or fall upon the construction to be given to the executory contract of sale, and particularly to that clause thereof hereinbefore quoted relating to the church's use and occupation of the property for a designated period upon the payment in lieu of rent of a stipulated rate of interest upon the paid-up installments of the purchase price. The plaintiffs insist that the executory contract in question did not confer the beneficial ownership upon the vendee pending payment of the purchase price, and that therefore that clause of the contract giving the possession, use, and occupation of the property to the church pending performance of the contract in consideration of its payment of interest upon the paid-up installments of the purchase price cannot be construed to mean that the church's possession at the time of the assessment was in effect that of a tenant.

This contention cannot be sustained. It will be conceded that it is the rule generally that an executory contract of purchase and sale does not have the effect of diverting the legal title to the property which may be the subject of the contract from the vendor, and transferring it to the vendee. Under such a contract the vendee acquires only an equitable title to the property, and consequently is not entitled as a matter of right to the possession of the property. (*Willis v. Wosencraft*, 22 Cal. 608; *Jackson v. Torrence*, 88 Cal. 521, [23 Pac. 695]; *Deputy v. Mooney*, 97 Ind. 463; *Teller v. Schulz*, 123 App. Div. 883, [108 N. Y. Supp. 325].) The right of possession remains in the vendor pending performance of the contract unless it be expressly or impliedly provided that the vendee shall have possession (*Fitch v. Windram*, 184 Mass. 68, [67 N. E. 965]; *Corning v. Loomis*, 111 Mich. 23, [69 N. W. 85]; *Olson v. Minnesota etc. Ry. Co.*, 89 Minn. 280, [94 N. W. 871]; *Sample v. Lyons*, 59 App. Div. 456, [69 N. Y. Supp. 378]; *Krakow v. Wills*, 125 Wis. 284, [4 Ann. Cas. 1016, 103 N. W. 1121]). And where the contract so provides the vendee is entitled to the beneficial use of the property, and, therefore, even though his title be only equitable, it carries some of the incidents of an absolute ownership such as personal occupation and the right of leasing the property to others. (*Fitch v. Windram*, 184 Mass. 68, [67 N. E. 965]; *Nearing v. Coop*, 6 N. D. 345, [70 N. W. 1044].)

While the contract in controversy here does not expressly give the plaintiffs' assignor the right to the possession, use,

and occupation of the property pending the performance of the contract, nevertheless the granting of that right may be fairly inferred from that clause of the contract which provides that the church shall retain the possession, etc., without paying rent save in the form of interest upon the paid-up installments of the purchase price. This clause of the contract compels the conclusion, we think, that it was the intent of the parties that pending performance the vendees were to have the possession and beneficial ownership of the property with all of the incidents ordinarily appertaining thereto. Consequently it must be held that the church's use and occupation of the property was in effect that of a tenant; and it is idle to argue that the interest which the church was required to pay upon the paid-up installments of the purchase price cannot be considered as rent. Such interest was to be paid as a return or compensation for the use of the property, and was therefore rent in the broad legal sense of the term. (Bouvier's Law Dict.; *Schuricht v. Broadwell*, 4 Mo. App. 160.)

For the reasons stated we are of the opinion that the contractual relation of the church and the vendee was, at the time of the assessment, and at all times subsequent thereto, to all intents and purposes that of landlord and tenant. Consequently the property in question was not exempt from taxation.

The judgment appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

---

[Civ. No. 1629. First Appellate District.—March 27, 1916.]

FRANK W. FLITTNER, by Frank L. Trimble, His Guardian ad Litem, Respondent, v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (a Corporation), Appellant.

**CONTRACTS—DISAFFIRMANCE BY MINOR—RESTORATION OF CONSIDERATION.**

A minor under the age of eighteen years may disaffirm a contract without restoring or offering to restore the consideration.

**12.—CONTRACT OF LIFE INSURANCE — DISAFFIRMANCE BY MINOR — LAW APPLICABLE.**—A contract of life insurance entered into in this state

80 Cal. App.—14

by a minor under the age of eighteen years is subject to the laws of this state in the matter of the right of such minor to disaffirm the contract and recover the premiums paid thereunder, and not subject to the laws of the state under which the company was organized and exists, notwithstanding the provision in the policy that the payment of the benefits and of the premiums should be at the home office of the company.

**ID.—INTERPRETATION OF LIFE INSURANCE CONTRACTS.**—While the law of the place of performance of an insurance contract governs as to its construction and legal effect, as a general proposition the law of the place where the contract is made controls as to its execution and validity, including the capacity of the parties to make the contract.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. **Adolphus E. Graupner**, Judge.

The facts are stated in the opinion of the court.

**Pillsbury, Madison & Sutro**, and **Almon E. Roth**, for Appellant.

**Louis H. Brownstone**, for Respondent.

**KERRIGAN, J.**—This is an appeal by defendant from a judgment in favor of the plaintiff in an action in which the plaintiff, having disaffirmed a contract of insurance entered into by him with the defendant while a minor under the age of eighteen years, sought to recover the amount of premiums paid thereunder prior to the commencement of this suit.

On the eleventh day of February, 1910, the defendant, a corporation organized and existing under the laws of the state of New York, issued to the plaintiff, **Frank W. Flittner**, a policy of insurance insuring his life in favor of his mother for the sum of ten thousand dollars. At the time of the issuance of the policy the plaintiff was sixteen years old and resided in San Francisco, where the application for the insurance was made. After the usual medical examination, which was also had in San Francisco, the application was sent to the home office of the company in New York, where, upon its being found satisfactory, a policy was prepared and executed by the defendant, which then sent it to its general agent in San Francisco, and it was there delivered by such agent to the plaintiff, the latter at that time paying to the agent the first

annual premium. This payment was in pursuance of one of the provisions of the policy, which not only required that the first year's premium should be paid in advance, but also that the policy should not take effect until such premium had been paid during the good health of the assured.

The provisions of the policy in respect to payment of loss were as follows: "The Equitable Life Assurance Society of the United States agrees to pay at its home office in the City of New York Ten thousand dollars upon receipt of due proofs of the death of the insured, provided this policy is then in force and is then surrendered properly released to his mother Mary Flittner, beneficiary, with the right on the part of the insured to change the beneficiary."

With respect to the payment of premiums the policy provided as follows: "All premiums are payable in advance at said home office or to any agent or agency cashier of the society upon delivery, on or before their due date, of a receipt signed by an executive officer of the society, that is, the president, a vice-president, secretary, assistant secretary, comptroller, deputy comptroller, treasurer, or an assistant treasurer, and countersigned by said agent or agency cashier."

Horace C. Donnels, the agency cashier and traveling auditor of the defendant, also testified that upon policies issued to residents of San Francisco premiums are usually received and death benefits actually paid there. In case of receipts, he testified that they were prepared at the home office, but sent to and countersigned at San Francisco. The signatures of the officers upon such receipts being merely *facsimiles*. In the case of death benefits, the checks were prepared in New York, but usually forwarded to the agent in San Francisco and there delivered to the beneficiary.

Prior to the commencement of this action the plaintiff, by his attorney, wrote a letter to the defendant purporting to disaffirm the contract of insurance, and demanding the return of the premiums paid. The demand was based upon the ground that the plaintiff was a minor sixteen years of age at the time he entered into the contract of insurance, and hence under the law of this state was entitled to disaffirm it. The defendant denied this right on the part of the plaintiff, and refused to return the premiums paid, whereupon this action was brought by the plaintiff through his guardian *ad litem* to

recover said premiums, and to have a certain note canceled which he had given in payment of a further premium.

A minor under the age of eighteen years may disaffirm a contract without restoring or offering to restore the consideration. But the defendant claims that the contract of insurance in the case at bar was made by the parties under and subject to the laws of the state of New York, and that, as it was to be performed in that state, it was subject to its laws. The law of New York touching this subject reads: "In respect of insurance heretofore or hereafter by any person not of the full age of twenty-one years, but of the age of fifteen years or upwards, effected upon the life of such minor for the benefit of such minor, or for the benefit of the father, mother, husband, wife, brother or sister of such minor, the assured, by reason only of such minority, shall not be deemed incompetent to contract for such insurance or for the surrender of such insurance, or to give a valid discharge for any benefit accruing or for money payable under the contract."

The trial court in part found: "That said contract was delivered by the defendant in the city and county of San Francisco, State of California, and the first premium therefor was paid to the defendant in the city and county of San Francisco, State of California, and that said contract was not made under and by virtue of the laws of the State of New York and was never and is not now subject to or was it made in contemplation by the parties hereto of the laws of the State of New York, but on the contrary said policy was made in contemplation of the laws of the State of California, and was intended by both parties thereto to be delivered and performed in the city and county of San Francisco, State of California, and said contract was made in the said city and county of San Francisco, said state."

The court also found that the New York statute hereinabove referred to "does not apply to this case, and the plaintiff can rescind and disaffirm the" contract evidenced by the policy of insurance referred to "and recover the premiums paid thereon, and that the said contract is not now a valid and subsisting and binding contract of insurance between the parties thereto, with the same force and effect as if said contract or policy was entered into while said Frank W. Flittner was over the age of twenty-one years."

In this case, as intended by the parties, the plaintiff received the policy in California upon the payment by him of the first year's premium in advance. The last act, therefore, essential to the consummation of the contract of insurance was done in California; and it follows under the authorities that the contract was made in California. (Civ. Code, sec. 1626; *Equitable Life Ins. Co. v. Clements*, 140 U. S. 226, [35 L. Ed. 197, 11 Sup. Ct. Rep. 822]; *California Sav. Bank v. American Surety Co.*, 87 Fed. 120; *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 245, [38 L. R. A. (N. S.) 57, 56 L. Ed. 419, 32 Sup. Ct. Rep. 220]; 1 Cooley on Insurance, pp. 649 and 658.) The contract, therefore, would be governed by the laws of this state if it did not contemplate, as we think it does, that the place of performance shall be in New York.

The policy provided that the payment of the benefit should be at the home office of the defendant in New York; and as to the premiums, they, too, were to be paid at the home office. It is true that the policy also provided that they might be paid to any agent or agency cashier of the society upon delivery of a receipt signed by an executive officer thereof; but in this regard it is to be noted, as pointed out in the case of *Fidelity Mut. Life Ins. Co. v. Harris*, 94 Tex. 25, [86 Am. St. Rep. 813, 57 S. W. 635], that the policy nowhere provided that agents authorized to receive premiums should be appointed, or if appointed that they should be maintained in California or in any other place. Under the terms of the policy, then, if no agent or agency cashier of the defendant society were appointed or maintained in California, the premiums must of necessity have been paid in New York.

The rule that a contract made in one state to be performed in another is to be governed by the law of the state of performance is well established. The rule is well stated in the recent case of *Bartlett v. Collins*, 109 Wis. 477, 481, [83 Am. St. Rep. 928, 85 N. W. 703, 704], in which the court says: "As a general rule the construction and validity of a purely personal contract depends upon the law of the place where made (citing Story, Conflict of Laws). If, however, the contract is made in one place to be performed in another, then as a general rule the place of payment and performance is the place of contract (citing 2 Parsons on Contracts, 8th ed., p. 583). The rule is founded on the idea that in making

a contract to be performed in another state, the parties must have had that other state in mind."

The rule is stated as follows, in the case of *Southern Express Co. v. Gibbs*, 155 Ala. 303, 309, [130 Am. St. Rep. 24, 18 L. R. A. (N. S.) 874, 46 South. 465, at 467]: "A contract, as to its nature, obligation and validity, is governed by the law of the state where made, unless it is performed in another state, in which case it will be governed by the law of the state of performance. When it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed."

In *Short v. Trabue*, 61 Ky. (4 Met.) 298, the court says: "An agreement to perform an act at a particular place is presumed to be made with reference to the law of that place, and an agreement to perform an act without designating a place of performance is presumed to be made with reference to the law of the place at which the agreement is made. These presumptions are conclusive. . . . The same rule applies to both parties to the contract."

In the case of *Seiders v. Merchants' Life Assn.*, 93 Tex. 194, [54 S. W. 753], the supreme court of Texas passed upon the point here involved. The defendant was incorporated under the laws of Missouri and had its principal place of business in the city of St. Louis in that state. The plaintiff made application in the state of Texas, through an agent of the defendant, for a policy of insurance. The policy was executed at the home office of the company and sent to its agent in Texas, and by him delivered to the plaintiff upon receipt of the first premium. The contract provided that the loss, if any, should be payable at the home office of the company within thirty days after the receipt and approval by it of satisfactory proofs of the death of the plaintiff. The court says: "The question in this case is, Does the law of the State of Missouri apply to this contract?" . . . Conceding that the contract of insurance was made in Texas, it is made payable in the home office in the State of Missouri, and all premiums are likewise made payable there. It does not provide for any act to be done elsewhere by the company. A tender of the money at the home office would have been valid. Unless there be something in the circumstances that indicates that the parties contracted with reference to the law of Texas the

legal effect of the contract must be determined according to the laws of the State of Missouri." (See, also, *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, [100 Am. St. Rep. 73, 73 S. W. 102]; *Fidelity Mutual Life Ins. Co. v. Harris*, 94 Tex. 25, [86 Am. St. Rep. 813, 57 S. W. 635]; *Waverly Nat. Bank v. Hall*, 150 Pa. St. 466, [30 Am. St. Rep. 823, 24 Atl. 666].)

While the law of the place of the performance of the insurance contract governs as to its construction and legal effect, nevertheless, as a general proposition, the law of the place where the contract is made controls as to its execution and validity, including the capacity of the parties to make the contract.

All matters connected with the performance of a contract are regulated by the law of the place where the contract by its terms is to be performed. All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law where the contract is made (*Union Nat. Bank v. Chapman*, 169 N. Y. 538, [88 Am. St. Rep. 614, 57 L. R. A. 513, 62 N. E. 672]; *Phoenix Mut. Life Ins. Co. v. Simons*, 52 Mo. App. 357; 2 Wharton on Conflict of Laws, sec. 401; note in *Mayer v. Roche*, 26 L. R. A. (N. S.) 767; *Hauck Clo. Co. v. Sharpe*, 83 Mo. App. 385).

As a general proposition the capacity of parties to contract is to be determined by the law of the place where the contract is made (2 Elliott on Contracts, 1114 et seq.; *Union Trust Co. of N. J. v. Knabe*, 122 Md. 584, [89 Atl. 1107, 1115, 22 Am. & Eng. Ency. of Law, 1327, 1328]; *Campbell v. Crampton*, 2 Fed. 417, 423; Story on Conflict of Laws, sec. 103; *Matthews v. Murchison*, 17 Fed. 760, 768). Matters that relate to the preliminary question whether a contract has been made are in general governed by a fixed law, which is independent of and cannot be varied by the intention of the parties. Such matters include the capacity of the parties to contract, conditions or restrictions upon the right to contract, and the formal validity of the contract. The governing law, on the other hand, with respect to the obligation of the contract, is, as a general proposition, dependent upon the intention of the parties, expressed or presumed (2 Wharton on Conflict of Laws, sec. 427e, p. 900).

If the plaintiff, being a minor, had given a delegation of power, his act in that regard would have been void; so would his contract relating to real property if he were at the time

of its execution under the age of eighteen (Civ. Code, sec. 34); and in either of those instances the case would fall squarely within the rule declared in the authorities just cited. In the case at bar while the contract of the plaintiff was not void, nevertheless he did not on account of infancy have the power at the time of its execution to enter into an absolutely binding contract. The contract at that time was potentially void, the law of the place of its execution having placed it within the power of one of the parties thereto to annul it by the mere announcement of his will and pleasure. When that announcement was made the contract was in no better condition than if it had been void *ab initio*. " 'It is the prerogative,' so the rule has been well stated in Mississippi, 'of the sovereignty of every country to define the condition of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not in the forum of his domicile, as they may infringe or not its interests, laws and policies.' " (1 Wharton on Conflict of Laws, p. 232.) If, then, the capacity of a person domiciled in California, with relation to an act to be performed outside its boundaries, when examined in the forum of his domicile, will be tested as to its validity by the law of that forum, *a fortiori* will it be so in the case of a contract actually entered into within its jurisdiction although to be performed beyond its territorial boundaries?

The law in its wisdom shields minors from their lack of judgment and experience, and vests in them under certain conditions the right to disaffirm their contracts. That right the plaintiff in this case invoked, and he was thereupon entitled to recover the premiums theretofore paid by him. This position may seem, under all the circumstances of the case, to be a hardship on the defendant, but "the right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with

which the law has purposely invested the latter, nor charge that the infant in exercising the right is guilty of fraud."

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 25, 1916.

---

[Civ. No. 1642. First Appellate District.—March 28, 1916.]

W. D. THOMAS, Appellant, v. EARL C. ANTHONY, etc.,  
Respondent.

**CONTRACT—SALE OF MOTOR CARS—RETENTION OF DEPOSIT AS DAMAGES—**

**RECOVERY OF—EVIDENCE—DUTY OF SELLER.**—Where a contract for the sale of motor cars provided that in case of the cancellation of the contract before its expiration, or in the event that its terms should not be fully complied with by the purchaser, the deposit should be retained by the seller as damages, it is the duty of the seller in an action by the purchaser to recover such deposit, on the theory of a rescission of the contract by mutual consent, to show that he has been actually damaged in the sum deposited, or that one of the other contingencies mentioned in the contract had arisen upon which he was entitled to retain the deposit.

**ID.—PRESUMPTION AGAINST VALIDITY OF LIQUIDATED DAMAGES—EXCEP-**

**TION TO BE PLEADED AND PROVEN.**—In order to entitle a defendant to retain the sum deposited with him as contingent liquidated damages for the breach of an obligation, it is incumbent upon him to show not only by averment, but also by proof, that his case is within the exception contained in section 1671 of the Civil Code, for without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that such agreement is void.

**ID.—RESCISSION OF CONTRACTS—POWER OF AGENTS.—**

**PRESUMPTIVELY AN** agent is employed to make contracts, and not to modify or rescind them; to acquire interests, not to give them up, and no power to vary or cancel an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests of his principal, unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name,

or to make terms or to settle upon his own discretion, as to overcome this presumption, and bind the principal by the modification, rescission, or release of the agent.

**ID.—CHANGE OF SALE PRICE—RESERVED RIGHT—EFFECT OF.**—An agency contract providing for the purchase of fifty motor cars between specified dates covering a period of almost one year, is not void by reason of the reservation therein of the right to change the list and net prices of such cars at any time by giving the purchaser two weeks' notice of such proposed change, where the purchaser's brokerage or discount is not altered by such change.

**ID.—CANCELLATION OF CONTRACT—RESERVED RIGHT OF SELLER—EFFECT OF.**—Such a contract is not void for lack of mutuality by reason of the provision therein reserving to the seller the right to cancel the contract upon fifteen days' notice and returning unused deposits.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Adolphus E. Graupner, Judge.

The facts are stated in the opinion of the court.

Edwin H. Williams, for Appellant.

James P. Sweeney, and George F. Snyder, for Respondent.

**KERRIGAN, J.**—This is an action brought to recover from the defendant one thousand dollars deposited with him by the plaintiff in conformity with the terms of a written agreement entered into between them.

When plaintiff's case was concluded defendant moved for a nonsuit, which was granted, and judgment was rendered and entered thereon. The appeal is from such judgment.

The testimony introduced shows that the plaintiff entered into a contract in writing with the Western Motor Car Company, the trade name under which the defendant Anthony did business. The contract was a lengthy instrument, providing substantially that Thomas should purchase from the defendant fifty Saxon motor cars between the date of the agreement, February 20, 1914, and January 1, 1915. The cars were to be sold to him at "San Francisco list prices," and a brokerage or discount of forty dollars on each car so sold was allowed to him off of said list price. The defendant reserved the right "to change the list and net prices of these cars at any time by giving the plaintiff at least two weeks'

notice of the proposed change." The latter agreed to open an establishment for the sale of the cars at Fresno, keep a demonstrator for exhibition purposes, and resell the cars to such customers as he could secure under the conditions named in the contract. He also deposited with the defendant one thousand dollars, which, in case of cancellation of the contract before its expiration, or in the event that its terms should not be fully complied with by the plaintiff, was to be retained by the defendant as damages, or to be applied by him to the liquidation of accounts that might then be due to him under the contract. The right was reserved by defendant of "canceling the above contract upon fifteen days' notice and returning unused deposits."

At the trial the plaintiff testified as follows: "After the contract was executed and I had paid this thousand dollars I had a conversation with Mr. Sells, the manager of the Western Motor Car Company. That was about March 3d. Mr. Sells told me I had better go down to Fresno and open up an office and take orders for the cars. I asked him how he wanted me to handle the cars. I said, 'You promised me a demonstrator the first of the month.' I informed him that under the conditions I could not handle the car on a paying basis, and I asked him if he would release me if I got another job. He said, 'Most certainly.' So I went away and came back next morning, and told him I had another job and asked him for my deposit, and he said, 'Mr. Thomas, it will have to come from the Los Angeles office, and it will be the end of the week before I can give it to you.' And he asked me to come back and get it then. I did come back then and several times later, and he kept putting me off. I had a conversation with Mr. Sells when Mr. Cheney was present. Mr. Cheney asked him how long it would be before I got my money, and he stated the end of the week. Mr. Cheney wanted to know if it would help matters if we paid the expenses of wiring to Los Angeles, and he said, 'No, it would not,' and that he would have to write. He said, 'You know we have a signed contract with Mr. Thomas and can hold him to it if we want to, but we don't intend to do it. Without a doubt he will have his money at the end of the week.'"

When the plaintiff rested his case, besides the contract he had introduced evidence, which, according to his view, entitled him to the return of the one thousand dollars deposit



upon the theory that there had been an oral mutual abandonment or rescission of the written contract. Whether or not that position is sound need not now be determined, but it is certain that there was no evidence before the court from which it could infer that the defendant was actually damaged in the sum of one thousand dollars, or that any of the other contingencies mentioned in the contract had arisen upon which the defendant was entitled to keep the whole deposit.

As before stated, the contract enumerates, in case of a cancellation or breach thereof by the plaintiff, various situations under which the defendant might be entitled to damages, and specifies in each instance of what the damage shall consist. Hence when the plaintiff had concluded his case—and assuming that his evidence showed that he had himself breached the contract, still at that point in the trial he was entitled to the return of the one thousand dollars unless the defendant should show any damage which he was entitled to recoup out of the deposit, or was entitled to the whole deposit, upon the showing made by plaintiff, by virtue of any of the provisions of the contract authorizing the defendant to retain it as liquidated damages.

Under the terms of sections 1670 and 1671 of the Civil Code, a provision in a contract fixing in advance the damage for a breach thereof is void, except when from the nature of the case it would be impracticable or extremely difficult to determine the actual damage.

It is clear that plaintiff's case disclosed nothing that brought it within the purview of the second of these two sections. Assuming that the plaintiff's evidence showed a breach of the contract, this alone would not warrant the granting of a nonsuit and the denial of all relief. In order to entitle a defendant to retain a sum deposited with him as contingent liquidated damages for the breach of an obligation, it is incumbent upon him to show not only by averment, but also by proof, that his case is within the exception contained in section 1671; for without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that such agreement is void. (*Long Beach etc. Dist. v. Dodge*, 135 Cal. 401, 405, [67 Pac. 499]; *Patent Brick Co. v. Moore*, 75 Cal. 205, [16 Pac. 890]; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 120, [25 Am. St. Rep. 102, 27 Pac. 36].) "If a suit be brought

on the contract for the actual and not the liquidated damages, as a matter of defense defendant must show to the court that it is erroneously instituted. It must be shown to the court by proper pleadings and competent proof that the contract falls within" the law permitting liquidated damages. "This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damages.' The mere stipulations of the contract are insufficient for that purpose." (*Deuninck v. West Gallatin Irr. Co.*, 28 Mont. 261, [72 Pac. 618].)

While the judgment must be reversed for the error of the court in granting the defendant's motion for nonsuit, it is proper to notice several other contentions of the appellant.

The nonsuit seems to have been granted upon the ground that the claimed oral, mutual rescission, being of and concerning a written contract, was not proven as required by the provisions of section 1698 of the Civil Code, which reads: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The appellant, however, contends that the rescission, being agreed to by the parties to the contract, constituted a mutual oral agreement of substitution for the written contract, and hence is not a modification thereof within the meaning of the section just quoted (*Pearsall v. Henry*, 153 Cal. 314, [95 Pac. 154, 159, 35 Cyc. 128]; *Credit Clearance Bureau v. Hochbann Contracting Co.*, 25 Cal. App. 546, [144 Pac. 315, 20 Cyc. 219, 74 Am. Dec. 658 (note)] ; 1 Greenleaf on Evidence, sec. 303). As the evidence may be substantially different upon a retrial of the cause we do not deem it necessary to determine the legal question thus presented. Moreover, assuming that the law is as stated by the plaintiff, we still very much doubt whether he proved a rescission by agreement; for, in plaintiff's evidence, there seems to be an intimation that while the agent of the defendant, E. N. Sells, had authority to enter into a contract, he was not vested with the power of consenting to its cancellation or rescission. In addition to this inference from the evidence, the presumption under the authorities seems to be, in the absence of a showing to the contrary, that an agent empowered to make contracts is not authorized to re-



scind or modify them. "Presumptively an agent is employed to make contracts, not to rescind or modify them; to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal . . . unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption and bind the principal by the modification, rescission or release of his agent." (31 Cyc. 1387.)

As we have seen, the contract reserved to the defendant the right to change the price of the cars at any time by giving to the plaintiff at least two weeks' notice of the proposed change, it being the duty of the plaintiff to sell at the list price. His brokerage or discount, however, was not altered by this change in the list.

We do not think that the contract by reason of this provision is void for failure to state the price at which the cars were to be sold. The costs of transportation or of the manufacture of an automobile are doubtless subject to variation as conditions change; and as the plaintiff and all other subagents were to be treated alike, and the sale covered a period of nearly a year, we think this provision of the contract a reasonable one. If it were not reasonable, and allowed the defendant to arbitrarily change the list price, the validity of the contract would be doubtful.

The contract also reserved to the defendant the right to cancel it upon fifteen days' notice, unused deposits to be thereupon returned. We do not think, as urged by the appellant, that this provision of the contract makes it void for lack of mutuality. In Page on Contracts, section 306, the author in treating of this phase of the law, says: "If A and B make mutual promises to each other, and A is to have the right at his election to withdraw from the contract and relieve himself from all liability thereunder at his pleasure, some courts hold that such contract is without consideration. . . . If, however, A must give notice for a substantial period of time before ending his liability under the contract, and such liability is to last until the end of time for which the notice is given, A's promise is a consideration. Thus if A has the right to

end the contract at the end of any year, or on ten days' notice, or on two weeks' notice, A's promise is a consideration."

For the error of the court in granting the defendant's motion for nonsuit the judgment must be reversed, and it is so ordered.

Lennon, P. J., and Richards, J., concurred.

---

[Civ. No. 1736. First Appellate District.—March 29, 1916.]

**EAST SAN MATEO LAND COMPANY** (a Corporation),  
Appellant, v. **SOUTHERN PACIFIC RAILROAD  
COMPANY** (a Corporation), Respondent.

**DEED—RAILROAD RIGHT OF WAY—DURATION OF ESTATE—CONSTRUCTION OF INSTRUMENT.**—A deed to a railroad corporation which recites that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveys the land described in such deed to the railroad company and its successors "during the legal existence of said company, solely upon the following conditions [here follow certain conditions] . . . ; and upon the breach . . . of any of the aforesaid conditions, this grant shall become void, and the estate hereby conveyed . . . shall cease and determine, and the said land shall absolutely revert to the said party of the first part (grantor), his heirs or assigns, in fee simple . . . and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary," shows an intention to limit the duration of the grant to the period of the legal existence of the company, and not an intention to irrevocably dedicate the land to railroad use upon a condition subsequent.

**ID.—CONVEYANCE OF REVERSIONARY INTEREST—CONSTRUCTION OF DEED.** A deed, made by the successor in estate of the grantor, conveying a large tract of land within which such right of way was included, conveys to the grantee the reversionary interest of the grantor therein, notwithstanding such right of way is reserved and excepted in the granting clause, where such clause is immediately followed by an explanatory provision showing an intent and purpose on the part of the grantor to convey such right of way to the grantee.

**ID.—CONSTRUCTION OF DEEDS.**—In construing a deed every provision, clause, and word shall be taken in consideration in ascertaining the meaning of the grantor, whether words of grant, of description, or

words of qualification, restraint, exception or explanation, and every word shall be presumed to have such force and effect as it can have.

**ID.—RAILROAD CORPORATIONS—NATURE OF CONTRACTS FOR RIGHTS OF WAY.**—While it is true, where land has been taken for public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time of the taking, and while it is also true that this right to compensation is a personal one which does not run with the land, nor pass by conveyance thereof after the right accrues, such doctrines in no way affect or abridge the right of railroad corporations to enter into a binding obligation or contract, with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land.

**ID.—ACCEPTANCE OF CONVEYANCE UPON CONDITION—RIGHT OF RAILROAD CORPORATION.**—A railroad may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant, and such a contract may create an estate less than a fee in land taken for a right of way.

**ID.—EXPIRATION OF LIMITED ESTATE—CONTINUANCE OF USE—DUTY OF RAILROAD CORPORATION.**—Where an estate is granted to a railroad corporation for a limited period, and at the expiration thereof, the corporation elects to continue its use for a right of way, it can only do so by compensating the reversioner.

**APPEAL** from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Henry Conlin, for Appellant.

Frank McGowan, and Evan J. Foulds, for Respondent.

Garrett W. McEnerney, as *Amicus Curiae*.

**KERRIGAN, J.**—This action was brought by plaintiff to recover the sum of seventy-seven thousand eight hundred dollars, the alleged value of about four acres of land, used as a portion of the right of way of the defendant corporation.

The defendant, after answering plaintiff's amended complaint, moved for judgment on the pleadings. The trial court granted the defendant's motion, and judgment was thereupon entered in favor of the defendant. This appeal is from such judgment.

The plaintiff alleges in its complaint that the San Francisco and San Jose Railroad Company, the predecessor of defendant, was incorporated under the laws of the state of California on August 18, 1860, for the term of fifty years, for the purpose of constructing and operating a railroad as a common carrier; that on June 6, 1862, Alvinza Hayward, then the owner of the land here involved, for the purpose of encouraging and promoting the construction of such railroad, conveyed to it and its successors an estate for years in said land, limited in duration to the period for which the said San Francisco and San Jose Railroad Company was incorporated, reserving by such deed unto the grantor, his heirs and assigns, the fee in said real estate and a vested estate in remainder therein, to take effect in possession upon the expiration and termination of the estate for years. The plaintiff further alleges that pursuant to said deed the company entered into possession of said real estate, and constructed a railroad thereon, which it operated and which its successor still operates, and that the defendant the Southern Pacific Company, by mesne consolidations and transfers, succeeded to and became the owner of all the rights of the San Francisco and San Jose Railroad Company under the Hayward deed; that one Emma Rose was on the eighth day of September, 1908, the owner of the property here involved, having succeeded to the same by mesne conveyances from Hayward, and that on such day she conveyed to the plaintiff all her right, title, and interest therein, including her interest in remainder and reversion reserved under the Hayward deed. It is then alleged that the period of the corporate, legal existence of the San Francisco and San Jose Railroad Company expired by limitation on the eighteenth day of August, 1910, and that the estate for years so granted to it and its successors ceased and terminated on said date, and that the estate in remainder and reversion reverted to and became vested in plaintiff, and that the defendant has appropriated and continues to use the land for its benefit as a right of way without having paid plaintiff compensation for such appropriation and use.

In addition to these direct recitals a copy of the deed from Hayward to the railroad company marked "Exhibit A," and that of Emma Rose to the plaintiff, marked "Exhibit B," are attached to and made a part of the complaint and are referred



to therein. Then follows the prayer for judgment for the value of the land.

The defendant answering, alleged in substance:

(1) That the deeds of Hayward to the San Francisco and San Jose Railroad Company attached to the complaint and marked "Exhibit A," conveyed a fee to the grantee therein named upon a condition subsequent, with a reversionary interest in the grantor;

(2) That there is no allegation that any act was ever done by Hayward or any other person showing an intent to exercise the right of reversion, and hence the title conveyed is still in the defendant as the successor in interest by consolidation with the grantee under the Hayward deed;

(3) That the deed of Emma Rose to the plaintiff, dated August 20, 1908, did not convey to it the land described in the complaint and mentioned in the Hayward deed, but by express terms excluded the same from the operation thereof; hence that plaintiff is not the owner, and cannot recover in this action;

(4) That Alvinza Hayward was, at the time of the taking of the land described in the complaint the owner thereof, and that any damage that accrued by reason of the taking was the personal property of Hayward as such, and would not pass to any of his grantees by a mere conveyance of the land.

The judgment given upon the pleadings was based upon the construction given these two deeds by the trial court; and the meaning and effect of these two instruments present the main questions for our consideration upon this appeal.

We will first discuss the deed given by Hayward to the San Francisco and San Jose Railroad Company in the year 1862 attached to the complaint and marked "Exhibit A." This deed recited that for and in consideration of encouraging and promoting the construction of a railroad from San Francisco to San Jose, and for other considerations, the grantor conveyed the land in question to said railroad company and its successors "during the legal existence of said company, solely upon the following conditions [here follow certain conditions] . . . ; and upon the breach . . . of any of the aforesaid conditions, this grant shall become void, and the estate hereby conveyed . . . shall cease and determine, and the said land shall absolutely revert to the said party of the first part (grantor), his heirs or assigns, in fee simple . . . and shall in

like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary."

Here by clear and unequivocal language the grantor limits the duration of the grant to the time during which the grantee corporation could exist under the constitution; and, in the same manner, and with equal precision, exacted that "at the expiration of the legal existence of said company (such land shall) revert to" the grantor, his heirs or assigns.

It is claimed by the defendant, however, that the deed clearly shows that it was the intention of the grantor to irrevocably dedicate the land to railroad use upon a condition subsequent; and as no act was ever done to divest the defendant as successor in interest of the grantee thereunder, that it follows that the Southern Pacific Company is still the owner of the legal title and estate.

No question is here presented of a breach of any condition subsequent. The right here claimed is based upon the estate in reversion to take effect in possession on the expiration of the particular estate granted by the deed. There is a broad distinction between this right and one based upon forfeiture and re-entry for breach of a condition subsequent (*Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472, [82 Atl. 418]). The deed in question, it is true, created certain conditions subsequent, and provided upon a breach of any of the conditions that the estate conveyed should cease and determine; but, as we have seen, it also contained the additional clause: "and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, anything herein contained to the contrary notwithstanding." Nothing could be added to more clearly express the intention of the grantor.

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, sec. 1638.) It seems plain to us, therefore, that the duration of the estate or easement granted was definite and precise, and was one limited for years and not in fee (*Robinson v. Missisquoi R. R. Co.*, 59 Vt. 426, [10 Atl. 522]; *Barnett v. Barnett*, 104 Cal. 298, [37 Pac. 1049]; *Weller v. Brown*, 160 Cal. 515, [117 Pac. 517]; *Burnett v.*



*Piercy*, 149 Cal. 178, [86 Pac. 603, 14 Cyc. 1161]; *Pavlovich v. Southern Pac. Co.*, 150 Cal. 39, [87 Pac. 1097].)

Equally clear is the intention of the grantor, Emma Rose, in the character and quantity of the estate conveyed by her to the East San Mateo Land Company, the plaintiff. The deed dated August 20, 1908, is in the ordinary form of grant, bargain, and sale, by which she conveyed to the plaintiff, for the expressed consideration of ten dollars, certain property in San Mateo County, of which the land in controversy is a part. In this deed are some twenty-one enumerated exceptions or reservations, the only one here involved, however, being the eleventh, which reserves the land in question, describing it with reference to the deed by which it was conveyed to the San Francisco and San Jose Railroad Company. Following the enumeration of those exceptions is an explanatory clause or provision in this language: "It being the intent and purpose of the party of the first part by this grant to convey to the said party of the second part all the lands and their appurtenances owned at the date of these presents by the said party of the first part, situate in and adjacent to the town of San Mateo, County of San Mateo, State of California, lying East of the Southern Pacific Railroad right of way, containing seven hundred acres more or less, together with all the interests, estates in remainder and reversion, rights of forfeiture and re-entry thereof, in and to any and all lands described in the foregoing exceptions numbered one to twenty-one inclusive, belonging to the said party of the first part, 1st, personally; 2nd, as heir at law of Alvinza Hayward, deceased; 3rd, as heir at law, grantee and devisee of Charity Hayward." There can be no question as to the intention of Emma Rose to convey to plaintiff by her deed the reversionary interest reserved by Hayward from the San Francisco and San Jose Railroad Company and to which she had succeeded. Such intention is clearly expressed in the explanatory clause just quoted. The reservation of the twenty-one excepted parcels was beyond all doubt for the purpose of saving herself harmless from any liability upon the warranties implied from the form of her deed, in view of the previous conveyance of different parcels or interests once forming a part of the tract covered by her present conveyance, and perhaps also because it was deemed that this was the simplest and most convenient manner to describe the land to be conveyed. That she in-

tended to convey all of the right, title, and interest that she owned in the land is plainly evident.

Notwithstanding the clearly expressed intention of Emma Rose it is insisted by defendant that, having by the granting clause retained the title in herself to the property described in the twenty-one exceptions, no subsequent provision of the deed could effect a change. This may have been the early rule of construction; but the modern doctrine is that the intention of the grantor as gathered from the entire instrument, taking it by its four corners, must prevail, and that that intention may be expressed anywhere in the instrument and by any words. This is the rule laid down in our Civil Code. It is there provided: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, sec. 1641.) Accordingly the supreme court of this state has held that every provision, clause, and word shall be taken into consideration in ascertaining the meaning of the party, whether words of grant, of description, or words of qualification, restraint, exception, or explanation, and that every word shall be presumed to have such force and effect as it can have (*Pavlovich v. Southern Pacific Co.*, 150 Cal. 39, [87 Pac. 1097]). See, also, *Barnett v. Barnett*, 104 Cal. 298, 300, [37 Pac. 1049], where it is said: "The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the *habendum* as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the *habendum* clause to restrict or limit or enlarge the estate named in the granting clause, the *habendum* will prevail over the granting clause. (*Faivre v. Daley*, 93 Cal. 664, 670, [29 Pac. 256]; *Pellissier v. Corker*, 103 Cal. 516, [37 Pac. 465].) 'It is in such case to be considered as an *addendum* or proviso to the conveyancing clause, which by a well settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same.' (*Bodine v. Arthur*, 91 Ky. 53, [34 Am. St. Rep. 162, 14 S. W. 904].)"

Nor is there any merit in the argument advanced by the defendant that the clause does not contain operative words of grant, but only exhibits an intention and purpose which are

not carried into present effect. As before stated, this clause is to be construed in connection with the rest of the deed. (Civ. Code, secs. 1066, 1636, 1641.)

Aside from the question of the construction of the deed defendant advances the argument in support of the judgment that when a public service corporation takes possession of land for public use the right to compensation accrues and takes effect at the time of the taking, and that such compensation belongs to the person who is the owner of the land at that time, and does not without express stipulation pass to the purchaser by subsequent conveyance; that as such right is a personal one it is governed by the general rule that personal rights do not pass by conveyance of the land, and hence the right of action remained in Hayward, and that the purpose for which the land was taken prevented the railroad company from taking less than a fee, and that this fact destroyed and rendered nugatory the right of reversion reserved in the deed.

It is true that where land has been taken for a public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time the land is taken, and belongs to the owner at the time of the taking; also that this right to compensation is a personal one which does not run with the land, nor does it pass by conveyance thereof after the right accrues. These doctrines, however, in no way affect or abridge the right of railroad corporations to enter into a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. (Lewis on Eminent Domain, 3d ed., secs. 462, 464.) In such cases public policy does not enter into it, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare. (2 Elliott on Railroads, 2d ed., 934.) A railroad, therefore, may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. The contract here provided for a limited estate only. If at the expiration of the estate granted the land was necessary for the railroad for

railroad purposes, and the corporation or its successor elected to continue its use for a right of way, it could do so by compensating the reversioner. Otherwise it must abandon this portion of its right of way and surrender possession to the owner of the estate in reversion. (*Pool v. Butler*, 141 Cal. 46-49, [74 Pac. 444]; *McCowen v. Pew*, 153 Cal. 735, 744, [15 Ann. Cas. 630, 21 L. R. A. (N. S.) 800, 96 Pac. 893]; *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, [36 L. R. A. (N. S.) 185, 117 Pac. 906].) If it elected to continue in the use after the eighteenth day of August, 1910, the time limited by the grant, the owner of the estate in reversion was entitled to compensation at that time.

As to the point that the complaint must be tested by its direct allegations without reference to the language of the deeds attached as exhibits, we think the complaint, reciting, as it does, that the exhibits are made a part of the complaint, the effect of such recital is to make every part and parcel of the instrument a portion of the complaint. (*Georges v. Kessler*, 131 Cal. 183, [63 Pac. 466].) We conclude therefor that the deeds, according to their legal effect, support the allegations of the complaint.

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 25, 1916.

---

[Civ. No. 1637. First Appellate District.—March 30, 1916.]

**W. R. GRACE AND COMPANY, Respondent and Appellant,  
v. HARRY LEVY, Appellant and Respondent.**

**SALE—BREACH OF WARRANTY OF QUALITY—SUFFICIENCY OF EVIDENCE.—**

In this action for damages for the breach of an express warranty which accompanied the sale of a certain quantity of coffee bags to the plaintiff by the defendant, it is held that the finding that the bags were not in the warranted condition upon their arrival at the port of destination is supported by the evidence.

**ID.—MEASURE OF DAMAGES—MARKET VALUE AT PLACE OF DESTINATION—WHEN ADMISSIBLE.**—Where it was not practicable for the plaintiff to inspect the bags at the place of shipment, and the defendant had knowledge at the time of sale as to where they were to be shipped and used, it is proper to fix the damages with reference to the market value of the bags at the port of destination rather than where they were baled and received.

**ID.—EVIDENCE—KNOWLEDGE OF PLACE AND USE OF BAGS.**—In such an action it is not error to permit the defendant as a witness for the plaintiff to be interrogated as to his knowledge, "at the time of the concluding of the transaction," concerning the place where the bags were to be used.

**ID.—RECOVERY OF DAMAGES—BREACH OF WARRANTY—INSPECTION PRIOR TO DELIVERY—EFFECT OF.**—The right of a buyer of personal property to recover damages for breach of an express warranty is not affected by an inspection of the property before delivery.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

Wise & O'Connor, for Defendant.

Goodfellow, Eells & Orrick, and O'Connor & Schwartz, for Plaintiff.

**THE COURT.**—This is an action for damages for the breach of an express warranty which accompanied the sale of a certain quantity of coffee bags to the plaintiff by the defendant. The complaint pleaded four causes of action in separate counts, each of which was identical in language save and except as to the dates and the amounts involved. The defendant answering denied all of the material allegations of the complaint save and except the allegation concerning the execution of the contract and the giving of the warranty.

On the issues thus framed the cause was tried by the court without a jury, and judgment rendered and entered in favor of the plaintiff in the sum of one thousand two hundred dollars upon the issues involved in the first three counts. Upon the issues involved in the fourth count the court found that the plaintiff had an opportunity to inspect and did inspect the bags contracted for prior to delivery, and approved the

same, and that therefore the plaintiff was not entitled as a matter of law to recover on that particular count, and rendered judgment thereon in favor of the defendant.

Upon the issues involved in the first count, the trial court found, in substantial accord with the allegations of the complaint, that on October 3, 1911, the defendant at the city and county of San Francisco, sold to the plaintiff ten thousand second-hand gunny bags, and that at the time of such sale, and as a part of the transaction, the defendant warranted said bags to be in good, sound condition and of the size of about twenty-eight by forty inches; that the defendant agreed to pack said bags in bales; that he knew they were to be shipped to and used in the vicinity of San Jose de Guatemala; that the bags were delivered to the plaintiff at San Francisco, the place agreed upon for delivery; that at the request of the plaintiff the bags as baled were marked "J. G. V. No. — San Jose de Guat.," and were delivered so marked to a drayman for the plaintiff; that the bags when thus delivered were not in good, sound condition or of the size of about twenty-eight by forty inches; that it had not been practicable for the plaintiff to inspect the bags after delivery at San Francisco, or prior to their shipment to the port of destination, or until their arrival at said port; that the plaintiff could not, with the exercise of the diligence usual and ordinary in such a transaction, have inspected said bags until their arrival at the port of destination; that the bags while being baled in San Francisco were not inspected or approved by the plaintiff or declared by it to meet the requirements of the warranty; that after shipment of the bags and before their receipt at the port of destination the plaintiff, relying on the contract and warranty in suit, paid to defendant the agreed price; that the bags reached the port of destination on November 30, 1911, and were received by the plaintiff; that if the quality and condition of the bags had measured up to the requirements of the warranty, they would have had a value of one thousand dollars; that by reason of the defendant's breach of the warranty the actual value of the bags at the time of their receipt by the plaintiff at the port of destination was only five hundred dollars; and finally, that the detriment suffered by the plaintiff from the breach of the warranty was the sum of five hundred dollars.

The second and third counts of the complaint involved respectively the sale of twelve thousand bags on November 20, 1911, and two thousand bags on December 18, 1911; upon practically the same state of facts as was involved in the first count the trial court found that the plaintiff was damaged because of the breach of the warranty in the sum of six hundred dollars on the second count, and in the sum of one hundred dollars on the third count.

From the judgment entered in favor of the plaintiff the defendant has appealed, and from the judgment entered in favor of the defendant upon the fourth count of the complaint the plaintiff has appealed. Both parties appeal from orders denying their respective motions for a new trial.

The findings above referred to are assailed by the defendant upon the ground, as claimed, that they are not supported by the evidence in that it was not shown that the bags were not good second-hand bags when delivered to plaintiff, or that the plaintiff suffered any damage by reason of the defendant's alleged breach of the warranty.

The evidence produced upon the whole case was in substantial conflict. We have neither the time nor the inclination to follow respective counsel in their discussion of the weight of the evidence and the credibility of the witnesses; and it must suffice for us to say that we are of the opinion that the evidence is sufficient to support the finding concerning the condition of the bags when they were delivered to the plaintiff. Much of the evidence upon this phase of the case was directed to showing the condition of the bags upon their arrival at the port of destination. There was, however, some evidence as to their condition when they were baled at and shipped by the defendant in San Francisco. This evidence was conflicting, and that offered and received upon behalf of the plaintiff tended to support the finding in question. This being so, the finding must stand, even though it be conceded, as counsel for the defendant contends, that it was incumbent upon the plaintiff to show that the bags were not as warranted when baled and shipped from the defendant's warehouse at San Francisco.

The contention that there was no evidence as to the damage suffered by the plaintiff is based upon the fact that all of the evidence in this behalf was confined to the market value of the bags at the port of destination. In this connection we

are satisfied that the evidence sufficiently sustains the findings that it was not practicable for the plaintiff to inspect the bags at San Francisco, and that the defendant knew at the time of the sale and warranty that the bags were to be shipped to and used at San Jose de Guatemala. This being so, the damages found for plaintiff were properly fixed with reference to the market value of the bags at the port of destination rather than at San Francisco where they were baled and received. (Civ. Code, sec. 3313; *Shearer v. Park Nursery Co.*, 103 Cal. 415, [42 Am. St. Rep. 125, 37 Pac. 412]; *Krasūnikoff v. Dundon*, 8 Cal. App. 406, [97 Pac. 172]; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, [96 Pac. 319].)

The trial court did not err in its ruling permitting the defendant Levy as a witness for the plaintiff to be interrogated as to his knowledge "at the time of the concluding of the transaction" concerning the place where the bags were to be used. If he knew at the time stated in the question that the bags were to be used elsewhere than in San Francisco, he must have acquired that knowledge during the negotiations between the parties and before the transaction was concluded. Evidence of such knowledge was therefore material to the issues.

Upon the issues involved in the fourth count of the complaint the trial court found substantially that on July 13, 1912, at San Francisco, California, the defendant sold the plaintiff eight thousand "second-hand coffee gunnies," agreeing to pack them in bales; that the defendant knew at the time of the sale that such bags were to be shipped to and used in the vicinity of San Jose de Guatemala; that on July 23, 1912, defendant packed eight thousand bags in bales and delivered them to the plaintiff at San Francisco, which was the place agreed upon for delivery; that at the request of the plaintiff these bags were marked "J. G. V. No.— San Jose de Guat.," and were delivered so marked to a drayman for plaintiff. The trial court found that these bags were not second-hand coffee gunnies; but it further found that the plaintiff had an opportunity to inspect the gunnies prior to their shipment to and arrival at San Jose de Guatemala; that they were inspected and approved by the plaintiff and by it declared to be second-hand gunnies; that the plaintiff accepted the bags as conforming in all respects with the bags sold to it by the defendant. Finally the court found that after the

shipment of the eight thousand bags involved in the fourth count in the complaint, and before their receipt at San Jose de Guatemala, the plaintiff, relying upon its contract with the defendant, paid him the purchase price of said bags. The trial court made no finding upon the issue raised by the pleadings as to the damage claimed to have been suffered by the plaintiff as the result of the defendant's breach of the express warranty alleged to have accompanied the sale.

Assuming that the evidence adduced upon the issues in the fourth count of the complaint sufficiently supports the finding that the bags in question were accepted by the plaintiff, still such finding does not in turn support the judgment. It is not disputed that the bags were expressly warranted to be "second-hand gunnies," and the finding that the bags delivered to the plaintiff did not meet the requirements of the warranty is sufficiently supported by the evidence. The inspection of the bags relied upon to support the judgment in favor of the defendant upon the fourth count of the complaint occurred, if at all, prior to the delivery to the plaintiff. Such inspection did not as a matter of law operate as a waiver of the warranty, nor excuse the defendant from liability for a breach of the same. (*Gould v. Stein*, 149 Mass. 570, [14 Am. St. Rep. 455, 5 L. R. A. 213, 22 N. E. 47]; *Barnum Wire etc. Works v. Seley*, 34 Tex. Civ. App. 47, [77 S. W. 827]; *Williams v. State*, 45 Ind. 157; *Williston on Sales*, sec. 208, p. 275; *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 389, [35 L. R. A. (N. S.) 501, 113 Pac. 870, 120 Pac. 27].)

It follows from what we have said that the judgment rendered and entered in favor of the plaintiff on the first three counts of the complaint, and the order denying the defendant's motion for a new trial, must be affirmed; and that the judgment entered in favor of the defendant upon the fourth count must be reversed, and a new trial ordered as to said fourth count only, and the cause remanded with directions to the trial court to find upon the one issue as to damages only as to said fourth count, letting stand all other findings as to said fourth count, and thereupon to enter judgment.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 29, 1916.

[Civ. No. 1470. Third Appellate District.—March 31, 1916.]

**STANDARD AMERICAN DREDGING COMPANY (a Corporation), Appellant, v. THE CITY OF OAKLAND (a Municipal Corporation), Respondent.**

**CONTRACT—DREDGING WORK—MATERIAL SUBJECT TO HALF MEASUREMENT—CONSTRUCTION OF SPECIFICATIONS.**—In this action to recover a balance alleged to be due on a written contract between plaintiff and defendant for certain dredging work in a portion of Oakland harbor, wherein the sole controversy was over the question whether payment for material dredged from the side slopes of the channel within specified areas should be made upon the basis of full measurement or half measurement of the quantity removed, it is held that the specifications of the contract are to be construed as requiring that payment should be made therefor upon the basis of half measurement.

**ID.—EVIDENCE—CUSTOM.**—Where a contract for dredging work is susceptible of a reasonable interpretation as to how the payment for material dredged from side slopes of channels shall be made, without incorporating in it any extrinsic provisions by evidence of usage or custom, the admission of such evidence is not prejudicial.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

Snook & Church, and C. Irving Wright, for Appellant.

Paul C. Morf, City Attorney, John J. Earle, Deputy City Attorney, Ben F. Woolner, and Chas. A. Beardsley, for Respondent.

**CHIPMAN, P. J.**—This is an action to recover a balance alleged to be due on a written contract between plaintiff and defendant for certain dredging work done by plaintiff in a portion of Oakland harbor. The contract called for work specified as sections "A," "B," and "C." The controversy arises out of the work done in the area designated in the contract as 'Section A,' the approach channel." The facts as to the amount of the material dredged and the amount of money actually paid are not disputed.

The portion of the specifications of the contract called in question is as follows:

**"AREAS.**

"For convenience of reference the area to be dredged is divided into 3 sections, Section A being the approach channel, Section B lying alongside the proposed bulkhead parallel to the Oakland Mole and Section C lying along the main bulkhead running in a general northeast and southwest direction.

**"DEPTH AND AREAS TO BE DREDGED.**

"Section A, the approach channel, shall be dredged to a depth of twenty (20) feet below low tide. The bottom width shall be five hundred (500) feet and side slopes shall be those assumed by the material during the dredging operations in said Section A. . . .

"Material dredged from below the specified depths or from beyond the specified areas as marked out by the City Engineer, and side slopes therefrom at rates not flatter than one vertical to four horizontal, will be estimated at half the actual volume of excavation and paid for accordingly, *provided*, however, that no payment will be made for material dredged from below a depth of one foot below the specified depth nor from a distance of more than ten (10) feet beyond said flattest limits of slope for said specified areas to be dredged. All material must be removed down to the depth specified over the whole area to be dredged. If soundings taken at the completion of any one section show a silting up to a depth of two (2) feet over a length of 200 feet the Board of Public Works may order such material removed by the Contractor and the City will pay for said work at the price bid for dredging."

This contract is dated January 31, 1911. On May 13, 1912, some modifications of the original contract were made, and, among others, it was provided: "Section 'A,' the approach channel, shall be dredged to a depth of twenty-five (25) feet below low tide, and the bottom width thereof shall be not less than three hundred and fifty (350) feet." Some changes were made in the dimensions of sections "B" and "C" and it was stated: "Top width of said sections shall be such as slopes may assume." The principal change made by this last contract was to reduce the width of the channel from five hundred feet to 350 feet and increase the depth from twenty feet to twenty-five feet.

There were 140,506 cubic yards of material excavated on the side slopes, "not flatter than one vertical to four horizontal," which was "estimated at half the actual volume of excavation and paid for accordingly." Plaintiff claimed that it was entitled to full rates. The court found the facts and gave judgment in favor of defendant. Plaintiff appeals from the judgment and from the order denying its motion for a new trial.

Counsel for defendant have printed in their brief a rough diagram, figure 1, which we use. Of this diagram plaintiff's counsel say in their reply brief: "It is a little difficult to portray in language alone the situation as it exists. Counsel for the other side have given a very clear diagram showing the nature of the dredging operations, and we can do no better than respectfully to refer the court to the same for a picture of the situation."



Figure 1.

The explanation of this diagram is thus given in respondent's brief:

"The cut represents a section of a vertical plane of the channel. The rectangle ABCD represents the specified area as marked out by the engineer, having a width of 350 feet and vertical sides 25 feet in height. Theoretically the dredging is to be performed within this area and the material is to be removed therefrom, the side slopes being such as the material naturally assumes in the course of the operations. Were the material constituting the side walls of the channel composed of hardpan or some substance which would stand in a vertical position or without any tendency to slip, slide, or roll, there would be no side slopes and the channel would be confined within the lines AB BD CD. However, on account of the character of the material involved some sloughing is inevitable, and side slopes form. The lines EB KB LB MB NB OD PD FD represent some of the side slopes from the specified area assumed by the material in the course of the dredging operations, BE and FD being lines at the angle of one vertical to four horizontal, the flattest limits for which payment is allowed. The actual side slopes, however,

may lie without this limit, and the lines GH HI IJ represent the extreme limit of pay work, that is to say, an excess depth of one foot and an excess width on each side of the channel of ten feet beyond the one to four slope. The line RS is drawn to indicate the actual channel, dredged, as was in places the case, beyond the horizontal and vertical limits for which payment could be made.

"In the phraseology of the certificate of completion shown at folio 240 of the transcript, and in the language of witness Peck in his testimony as set forth at folios 237 to 245, 'main channel' is represented by the rectangle ABCD; 'slopes' by any of the triangles NBA CDO, etc., within the limits EBA CDF; 'excess depth' by the one foot space between the lines TBDV and HI; and 'excess slope' by the spaces inclosed within the areas EBTG FDVJ.

"There is no dispute as to the fact that for the excavation performed within the specified area of main channel ABCD plaintiff is entitled to payment at the rate of \$.099 per cubic yard for the entire quantity of material removed; it is also agreed that for work upon the excess slopes and excess depths, that is between the lines EBDF GHIJ, plaintiff was to be paid for only one-half the actual volume of excavation performed; it is further stipulated that plaintiff was not to be compensated for removal of any material from beyond the limits GHIJ. The sole controversy is over the question whether for material dredged from the side slopes, that is any slope within the lines EBA CDF, the payment should be made upon the basis of full measurement or half measurement of the quantity removed."

It will thus be seen that the material involved was dredged from the area on the slopes above the lines EBA CDF, representing lines at the angle of one vertical to four horizontal. Soundings of the area to be dredged had been made by the city engineer for the information of his department and to aid him in the preparation of specifications for the work. A profile of the borings and field-notes thereof were filed in the engineer's office and were examined by plaintiff's engineers. The contractors, however, made their own soundings. The specifications contained the following provision: "Bidders are expected to visit and inspect the site of the work and the character of the material therein and will be furnished all available information in the office of the city engineer." These

soundings showed that there was much variation in the character of the material on the slopes. Some of the cross-sections had less depths of soft and more of hard or tough material than others, from which it was apparent that there would necessarily be less material to remove along the slopes at some places than at others. The dredging of the channel of the dimensions required with permanent vertical sides was not possible, for it was well known to all parties that the adjacent soft material would inevitably, to greater or less extent, slide into the channel unless removed, and it was less expensive to dredge this soft material as the work progressed than after it had slipped into the channel. The city was not concerned about this slope further than that it should be dredged to a depth sufficient to avoid the channel's filling in with material from that source. All the city desired was an open waterway of depth and width specified. Knowing, however, the character of the material underlying the water, as all parties did, it became necessary to provide in the contract for the dredging on the slopes as well as in the channel.

Except as to the channel, there could be and were no "specified areas as marked out by the city engineer." Necessarily the side slopes were "those assumed naturally by the material during the dredging operations in said section A," but the exterior boundaries and the depth of these slopes varied as the character of the material varied. Where, for example, there was little soft material with hardpan or clay underneath, the slope might be one to one and running back but a short distance, but where the material was soft for considerable depth, the slope might and did extend back many feet.

Another feature of the work should be noticed—that the head or cutter was often allowed to reach beyond the vertical lines in excavating the specified area or channel. One of plaintiff's witnesses testified: "Q. Why was it necessary, if you know, to dredge outside the limits of the dredging area for which pay was allowed? A. Two reasons. In the first place, it is impossible to locate the head of the cutter exactly. The only thing the man running the dredger has to go by is this line of piles along here and some stakes set outside [indicating on the blackboard]. He cannot see the head of the cutter. The dredge swings on a vertical axis. He cannot tell where the head of the cutter is, and in order to be on the safe side and dredge enough, he goes a little outside the line.

Another reason is that it is practically a universal experience that the slope does not stay [stay] as dredged. That is, the chances are that, while depending on the time and the material, the slope will flatten off by the material sliding into the channel. For fear that material will slide, it is necessary to dredge the bottom wider, because the original side slope is likely to flatten in the course of time."

The contention of plaintiff is thus briefly stated: "It is apparent that the channel in the Key Route Basin where the tide ebbs and flows could not be dredged to a depth of twenty-five feet below low tide, with vertical banks, and that side slopes were unavoidable and that this was contemplated by all the parties to the contract; and that material dredged from side slopes between the vertical line and the one vertical to four horizontal line was within the specified area to be dredged; and that material dredged from below the specified depths, and from beyond the specified area, that is, beyond the side slopes therefrom, at rates flatter than one vertical to four horizontal, would be estimated and paid for at one-half the actual volume of excavation; and that material dredged from the channel and side slopes therefrom at rates not flatter than one vertical to four horizontal were all to be paid for at full price of 9.9 cents per cubic yard, estimated at the actual volume of excavation." Plaintiff's assumption is that the "specified areas as marked out by the city engineer" included the "side slopes not flatter than one vertical to four horizontal" as well as the channel itself, and hence the material from both these areas was to be paid for at full rates. The contract provided that the contractor was to be paid: "Nine and 9/10 (9-9/10) cents per cubic yard for all materials dredged as required by the plans and specifications therefor, and this contract." We must turn to the specifications above quoted to ascertain the intention of the parties.

The only lines which the city engineer could mark out with any degree of certainty were the vertical lines of the channel. As already noticed, the material on the slopes was of such variable character that no one could tell definitely the depth or extent of the soft material, or of the hard material, or where the exterior lines of the slopes would be. In some parts the hardpan was found near the surface of the ground beneath the water, and the slope at such point would extend back but a short distance and the material dredged be easily

removed. At other points the slopes extended back some distance, because of a greater quantity of soft material encountered before reaching hardpan or firm earth that would not slip into the channel. It seems to us that the natural and grammatical construction of the specifications is, as claimed by defendant, and as was held by the lower court, that three classes of material were to be subjected to half measurement and paid for accordingly, namely: "1. Material dredged from below the specified depths"; that is, depths that were definitely fixed—as in the channel. "2. Material dredged from the specified area as marked out by the city engineer"; that is, beyond the fixed lines of the channel; "3. Side slopes therefrom [from the specified area] at rates not flatter than one vertical to four horizontal, with a proviso that no payment would be made for material dredged beyond certain vertical and horizontal lines." That is, the phrase, "will be estimated at half the actual volume of excavation," is qualified by what precedes it and relates to dredging "below specified depths"; to dredging "from beyond the specified areas" and to "side slopes therefrom [from the specified area] at rates not flatter than one vertical to four horizontal." And the limiting clause which follows seems to confirm this view, for it expressly provides "that no payment will be made for material dredged from a depth of one foot below the specified depth nor from a distance of more than ten feet beyond said flattest limits of slope for said specified areas to be dredged." The parties understood that side slopes were inevitable and dredging to some extent below specified depths, for the exact depth could not always be maintained, and so a limit as to depth beyond which no payment would be made was provided for and a one-half rate was fixed for dredging on slopes not flatter than one to four, and no payment would be made for material dredged "from a distance of more than ten feet beyond" this slope of one to four. We are unable to accept plaintiff's construction, for by it there would be no material subject to half measurement except such as was situated beyond the area specified by the city engineer and also beyond "the side slopes therefrom." Grammatically, as the specifications are phrased and punctuated, the verb "will be estimated" had for its subject material "from beyond the specified depths" and "from beyond the specified areas," and, as a further subject, the "side slopes." In determining what

was intended by the one to four line, we must assume that the parties contemplated that it was to subserve some function. Naturally, if not necessarily, there had to be some provision limiting the excavation which was subject to half measurement rather than to establish a boundary line. The method adopted of prescribing what should be treated as the flattest limit of slope and fixing the exterior boundary line at a prescribed distance from such line, it seems to us, was as fair as could have been suggested under all the circumstances. As respondent puts the matter: "The exterior boundary was to be either the wall of the side slope naturally assumed by the material as the dredging progressed, if steeper than or equal to one vertical to four horizontal, or, if that slope were flatter than one to four, then an imaginary line parallel with and distant ten feet horizontally beyond the one to four slope from the specified area. For any dredging outside that imaginary line no payment was to be made. In other words, if the material were to assume a slope of one to five or one to ten, it would be measured just as if it had assumed a slope of one to four, the allowance of ten feet would be made, and, for any excavation performed beyond that limit, plaintiff would not be entitled to compensation. On the other hand, where the slope of the material should remain at an incline of one to one or one to three the measurement would be of the side slope actually assumed. The one to four line is described as a necessary factor in establishing the limit of the slope and the exterior boundary of the excavation for which payment was to be made; and is not defined or described or established and does not purport to be defined or described or established for any other reason or purpose whatsoever."

Without further pursuing the inquiry, we think this is a reasonable view to take of the provisions of the contract in question. Respondent suggests that if any uncertainty exists in the contract, it must be assumed that such uncertainty was caused by the private party, the contract being with a public officer or body as such (Civ. Code, sec. 1654; *Miller v. Grunsky*, 141 Cal. 441, 451, 453, [66 Pac. 858, 75 Pac. 48]); and if in the contract there be any word, phrase, or clause of doubtful meaning, "it is to be presumed that the private party was responsible for the insertion and use thereof, and

the language of the instrument is to be interpreted most strongly against him or it."

Certain alleged errors in rulings by the court are assigned as prejudicial. Plaintiff's witness Peck, a civil engineer, testified that he had examined the final certificate of the city engineer with reference to the channel dredged known as section "A." The following question was then put to him: "Do you know from your investigation and your own knowledge of the certificate whether or not it states the facts with reference to the amount of material dredged?" An objection was sustained on the ground that the question called for the conclusion of the witness and that the certificate is the best evidence; further, also, that it was in form an omnibus question and did not call the attention of the witness to any particular thing. Later, in response to a question as to what investigation he made concerning the various items in the city engineer's final certificate, he stated that he "checked over these quantities as given by the soundings, cross-section soundings by the field force of the city engineer, and found the quantities correct as stated here." The court granted a motion to strike out the words "and found the quantities correct." He stated that he assumed the soundings to be correct but that he made his calculations with the city engineer's force; "we checked each other on these calculations." He was not allowed to "state what the figures there represent." However, he was allowed to state what he found after making these calculations, which was that "these figures as stated here give the actual amount excavated . . . in section 'A' within the limits of the channel as defined by the specifications" and he also included the work on the slopes. The witness was finally allowed to state the facts as to the amount of material excavated and that "the figures as stated give the actual amount." This, it seems to us, met the purpose of the questions objected to. Besides, the parties stipulated as to the quantity of material dredged by plaintiff. The court sustained objections to questions concerning the custom with reference to the payment for the excavation of side slopes. The matter sought to be elicited came out and was testified to without objection. Questions were objected to, and objection sustained, seeking the opinion of the witness whether or not "a civil engineer who is a city engineer of a city having a water front should have knowledge of a general custom or

usage of paying at full price for the volume of material dredged up to the specified limit of the side slope of the channel, to be dredged in waters adjacent to the city, provided said city has done work of dredging in the waters along said water front." Also, "should a civil engineer who has had practical experience of ten years or more, and who has prepared specifications for dredging in the waters of San Francisco Bay," have such knowledge?

It may be doubted whether the questions involved matter the subject of opinion or expert testimony. However, the witness was permitted to testify that civil engineers having seven years of practical experience in the vicinity of Oakland, of dredging work, would have knowledge of the general custom of paying full price for the actual value of material dredged up to the specified limits of the side slopes of channels to be dredged.

A witness for defendant, who was a civil engineer, and a member of the board of public works of Oakland when the contract was let, and who drew the specifications, was asked by the defendant: "Did you know of any such custom? Was there custom or usage upon the subject?" Referring to the custom as had been testified to, did he know of any such custom? Plaintiff's objection to its relevancy and incompetency was overruled. The witness answered the question: "I would answer it 'no,' because that subject is usually covered by the specifications." On cross-examination, this witness was asked the following question: "If the specifications did not mention side slopes at all, and they provided the dimensions and depth of channel and provided that the top width should be such as might be assumed by the side slopes, would you not consider that under the custom of the trade or usage of the trade, you should pay for all material dredged?" Objection by plaintiff was sustained on the ground that it was not cross-examination.

The answer to the first of the last two questions was that there was no such custom. He did not answer whether he knew of such custom. It was permissible to ask the witness whether such a custom existed in rebuttal of plaintiff's evidence that there was such a custom. He gave no other testimony in chief. The next question was obnoxious to the objection made as not cross-examination. Besides, it called for an opinion upon the assumption that a custom existed which he had just

denied did exist. The question also called for the opinion of the witness in a matter essentially within the province of the court to decide.

Mr. Woolner, city attorney who advised the board in preparing the contract, over plaintiff's objection was permitted to testify that he did not "know of any custom in regard to paying full price for material dredged in channels from the side slopes of those channels." The ruling is urged as prejudicial, for the reason that it was immaterial whether or not the witness knew of such custom at the time the contract was entered into, and did not tend to prove or disprove the existence of such a custom. Appellant concedes that a local or special custom must be known to the parties in order to be construed as a part of the contract, but it is contended, and cases are cited supporting the contention, "if it appears that the custom is so general that the parties will be presumed to have knowledge of it, then the parties to the contract are bound by its terms, even though one or the other of the parties may claim to have had no actual knowledge of such custom." On the other hand, cases are cited by respondent holding that where the custom is restricted to a particular business, it is permissible to show that one of the parties did not know of its existence. The evidence on the subject was directed to a custom with regard to a particular feature connected with the dredging business generally, not only in the waters of the bay of San Francisco, but elsewhere, rather than to a custom as to a particular business in the sense treated in the cases cited by respondent. Upon the question, however, whether such a general custom existed, there was some conflict in the evidence which the court had the right to consider in making its ruling. If the court held, as we may assume it did, that the general custom was not satisfactorily proven, it was not error to allow defendant to show want of knowledge of what was but a special or local custom.

It is to be observed that this question of custom is usually invoked to supply something as to which the contract is silent, or, as Mr. Greenleaf says, the true office is to "interpret the otherwise indeterminate intentions of the parties and to ascertain the nature and extent of their contracts, arising, not from express stipulation, but from mere implications and presumptions, and acts of a doubtful and equivocal character; and to fix and explain the meaning of words and expressions of

doubtful or various senses." (Greenleaf on Evidence, sec. 251.)

The supreme court said, in *Burns v. Sennett*, 99 Cal. 363, 371, [33 Pac. 916, 919]: "A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms; but it has a legitimate office in aiding to interpret the intentions of parties to a contract, the real character of which is to be ascertained, not from express stipulations, but from general implications and presumptions."

It appeared from the testimony of some of the witnesses that it was quite common for specifications in dredging contracts to provide for payment of side slopes at full rates, and other witnesses testified to the usage being that way because provision was generally made in the contract for such payment. We do not think that any just inference could be drawn from express provisions of contracts relating to dredging that in the absence of such provisions there would be implied agreement to make such payment. That it is the fact that a certain provision is generally inserted in a contract does not tend to prove that there is a usage that such provision would be given effect where the contract is silent on the matter. The real question is: What is the usage apart from the contract? If the contract deals with the particular fact in a way to be reasonably clear as to the intention of the parties, usage has no office to perform. We think the contract here is susceptible of a reasonable interpretation without incorporating in it any extrinsic provisions by evidence of usage, and that whether or not error was committed in ruling upon this question of usage, it was not prejudicial. In making its findings we think the court was justified in disregarding the evidence as to usage as we infer it did in not making any finding on that question. (See a discussion of the subject in *Hale Bros. v. Milliken*, 5 Cal. App. 344, 353, [90 Pac. 365].)

Some of the findings are attacked, and particularly finding VI, which is: "That it is not a fact that plaintiff dredged in the side slopes from said section A at rates not flatter than one vertical to four horizontal 144,506 cubic yards of material; and, in this connection, the court finds that no evidence was introduced at the said trial from which the court could determine the quantity of material dredged from said side slopes from said section A at rates not flatter than one vertical to

four horizontal, and placing its finding upon that ground the court finds that it is not a fact that plaintiff dredged from said side slopes 144,506 cubic yards of material or any other quantity of material, or any other number of cubic yards of material."

Certificates of work done were made from time to time on which plaintiff was paid, and from these certificates a final certificate was signed by the city engineer on which plaintiff received final payment. The account as finally certified to was as follows:

Main Channel.....	998340.9 cu. yds.		998340.9 cu. yds.
Slopes .....	144506.0 cu. yds.		72253.0 cu. yds.
Excess slope.....	41775.8 cu. yds.	less 1/2	20887.9 cu. yds.
Excess depth.....	55989.4 cu. yds.		27994.7 cu. yds.
			<hr/>
			1119476.5 cu. yds.
1119476.5 cu. yds. at \$.099.....			\$110823.17

"At said City of Oakland, this 7th day of March, 1913.

"PERRY F. BROWN,

"City Engineer.

"Correct

"T. E. RISLEY,

"Asst. Eng."

Mr. Risley testified that the matter of the interpretation of the contract came up between the witness and plaintiff's representatives, Mr. Beardsley and Mr. Peck, and also Mr. Perry, president of plaintiff company, upon the point whether "the values outside of the vertical lines should be considered as full value or not. The matter of showing excess slopes was not taken up by Mr. Beardsley until the time the final estimate was made." The monthly statements for August and September, 1912, showed but a single item for dredging, but on and after October, 1912, the statement showed the work on main channel and the slopes, and when there was any work done on excess depth that also was shown. It was because of this early disagreement as to the interpretation of the contract that the certificates were made up in this way. Mr. Risley testified that "in figuring the quantity of material dredged and the amount due thereunder no allowance was made for full measurement or full payment, outside of the vertical lines." Payment was made and received under these certificates thus made out, but we understand that the question remained open as to the controverted interpretation of the contract.

The court found (finding II): "That defendant paid to plaintiff the sum of \$7,153.05 for dredging 144,506 cubic yards of material outside of section A and outside of the specified area and between said specified area of said section A and a line sloping from said section A at the rate of one vertical to four horizontal, all estimated upon the basis of one-half of the actual quantity of excavation in full accordance with said plans and specifications." The only dredging in controversy was that done between the lines thus designated. As to the dredging in the main channel and below the one to four line, no controversy arises. The findings are so drawn, we think, as clearly to present the question at issue. They in effect hold that the specified area referred to in the contract is the area within the vertical lines, that is, the channel, and to be paid for at full rates; and that the area embraced between those lines and the lines of the slope of one vertical to four horizontal was to be paid for at half rates. Unless the contract may be interpreted in harmony with such findings, the judgment has no support. Otherwise, the judgment must stand.

Our conclusion is that the findings are supported by the evidence. The judgment and order are, therefore, affirmed.

Burnett, J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 28, 1916, and the following opinion then rendered thereon:

THE COURT.—We are asked to grant a rehearing, our attention being called particularly to two matters as to which it is suggested the opinion may be misleading:

First. In the second or amended agreement certain changes were made in the dimensions of sections A, B and C and directions were given as to the dredging to be done. In that connection the following appears: "Top widths of said sections shall be such as slopes may assume. And said contractors agree to dredge all material from such areas adjacent as may be ordered," etc. We think the above paragraph refers to all three sections, and if the opinion leaves any doubt upon the subject, this is to remove it.

Second. The point was suggested in respondent's brief that if there is any uncertainty in the contract, it must be

assumed that such uncertainty was caused by the private party, the contract being with a public officer or body as such (Civ. Code, sec. 1654), and the language of the instrument is to be interpreted most strongly against the private party.

In the opinion filed we stated the point made by respondent, but made no comment upon it and, in fact, did not apply the statutory rule. To relieve the opinion from any implication that importance was given to the matter, the reference to respondent's brief may be disregarded. We still think that "the specified areas as marked out by the city engineer" were the areas embraced within the vertical sides of the channel, and that the said slopes therefrom not flatter than one vertical to four horizontal were to be estimated and paid for "at half the actual volume of excavation." We do not think that the provision in the agreement of May 13, 1912—"Top widths of said sections shall be such as slopes may assume"—affects the provision in the original contract.

The petition is denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 29, 1916.

---

[Civ. No. 1533. Third Appellate District.—April 4, 1916.]

GEORGE T. PALMER et al., Respondents, v. S. A. WOODRUFF, Appellant.

**APPEAL—FAILURE TO FILE TRANSCRIPT—DISMISSAL**—Where more than forty days have elapsed since an appeal from a judgment was perfected, and no transcript has been filed, or extension of time given within which to file such transcript, the appeal will be dismissed.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

Welsh & Henry, for Appellant.

White, Miller, Needham & Harber, for Respondents.

THE COURT.—Notice of appeal from the judgment in the above-entitled cause was served and filed by defendant on July 20, 1915. On July 23, 1915, undertaking on appeal was filed. September 16, 1915, bill of exceptions was duly settled, and on December 13, 1915, motion for new trial was denied. Appellant has made no request of the clerk of the superior court to certify to a correct or any transcript of the record, and no further proceedings have been had toward prosecuting the appeal.

More than forty days having elapsed since the appeal was perfected and no transcript having been filed or extension of time given within which to file such transcript, on motion of respondents the appeal from the judgment is dismissed.

---

[Civ. No. 2053. Second Appellate District.—April 6, 1916.]

MARTHA B. SIMMONS, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF SAN DIEGO et al., Respondents.

**APPEAL—STATUTES CONFERRING RIGHT OF CONSTRUCTION.**—The provisions of the statutes conferring the right of appeal and prescribing the procedure are remedial, and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court.

**ID.—APPEAL FROM JUSTICE'S COURT—PAYMENT OF FEES.**—The purpose of the enactment of section 981 of the Code of Civil Procedure was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, it is a sufficient compliance with the statute.

**ID.—NOTICE OF APPEAL—TIME OF.**—While a justice of the peace may not be required to accept for filing any notice of appeal not accompanied with payment of the fees, and assuming that a notice of appeal left with the justice, without the fees, cannot be deemed filed until payment of the fees, it being the duty of the justice to file the notice upon the payment of the fees, it will be deemed

filed as of the date on which the fees were paid, where the payment is within thirty days after the rendition of judgment, and this is a sufficient compliance with the statute.

APPLICATION originally made in the District Court of Appeal for the Second Appellate District for a Writ of Prohibition to restrain the Superior Court of San Diego County from proceeding with the trial of a certain action on a purported appeal from a Justice's Court.

The facts are stated in the opinion of the court.

Albert J. Lee, for Petitioner.

Rogers & Rogers, Ford & Hammon, and Percy V. Hammon, for Respondents.

SHAW, J.—Upon notice duly given petitioner applies to this court for a peremptory writ of prohibition, the purpose of which is to restrain the superior court of San Diego County from proceeding with the trial of a certain case pending in that court on a purported appeal from the justice's court of San Diego township.

The application was heard upon respondents' general demurrer interposed to the petition.

It appears from the petition that on November 11, 1915, in a certain case wherein petitioner was plaintiff and one Elizabeth G. Clarke was defendant, a judgment was rendered in the justice's court of San Diego township in favor of the plaintiff; that on November 20, 1915, defendant in said action filed with the justice of the peace a notice of appeal from said judgment to the superior court of San Diego County. At the time of filing this notice of appeal defendant did not pay to the justice of the peace the fees provided by law to be paid to the county clerk for filing the appeal and placing the action on the calendar in the superior court; but a few days thereafter, and within the time specified by law for perfecting the appeal, she did pay to the justice of the peace such fees, which were transmitted to the county clerk, together with the papers on appeal.

Section 981 of the Code of Civil Procedure provides: "No appeal taken from a judgment rendered in a police or justice court in civil matters shall be effectual for any purpose what-

ever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon transmitting the papers on appeal, the justice or judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section." The contention of petitioner, urged in support of a motion made in the lower court to dismiss the appeal, as well as that urged in support of this application, is that, inasmuch as the appellant neglected to pay the clerk's fees to the justice of the peace at the precise time when she presented and had filed her notice of appeal, the appeal so taken was ineffectual for any purpose. In *Rigby v. Superior Court*, 162 Cal. 338, [122 Pac. 960], it is said: "The provisions conferring the right of appeal and prescribing the procedure are remedial, and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court." The purpose of the enactment of section 981 of the Code of Civil Procedure was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, it is, in our opinion, a sufficient compliance with the statutory provision. By this we do not, however, intend to say that the justice is required to accept for filing any notice of appeal not accompanied with payment of said fees. The case of *Johnson v. Superior Court*, 28 Cal. App. 618, [153 Pac. 404], cited by petitioner, is not in point, for the reason that in that case the fees were not paid until after the expiration of thirty days; and since clearly the appeal had not been perfected within the thirty days, it was held the superior court had no jurisdiction to entertain it, and a writ of prohibition was granted.

Assuming, as claimed by petitioner, that the notice of appeal could not be deemed filed until payment of the fees in

question was made, then, since it was left with the justice whose duty it was to file it upon payment of the fees, it should be deemed filed as of the date on which the fees were paid, and since this was within the thirty days after the rendition of judgment, it would seem to be a sufficient compliance.

In our opinion, the application for the writ should be, and it is, denied.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 1, 1916.

---

[Civ. No. 2018. Second Appellate District.—April 10, 1916.]

**W. A. ROCHE, Petitioner, v. SUPERIOR COURT OF THE  
COUNTY OF SAN DIEGO et al., Respondents.**

**SUPERIOR COURTS—ORIGINAL JURISDICTION—CONSTITUTIONAL LAW.—**

The original jurisdiction of the superior courts by virtue of article VI, section 5, of the constitution extends to sundry subjects declared in such section and to "all such special cases and proceedings as are not otherwise provided for," which means necessarily that wherever a case, or cause, exists which is outside the scope of those directly mentioned in such section, and jurisdiction thereof has not been vested in any other court or official body authorized to exercise judicial functions, the jurisdiction to hear and determine such special case is vested in the superior court.

**ID.—ELECTION CONTEST UNDER LOCAL OPTION LAW—JURISDICTION OF SUPERIOR COURT.—**The right to contest an election held pursuant to the provisions of the "Wyllie Local Option Act" (Stats. 1911, p. 599) is a special case within the jurisdiction of the superior court, in view of the fact that section 9 of such act gives the right to make such a contest and that no other court is vested with jurisdiction thereof.

**ID.—PROCEDURE—INAPPLICABILITY OF CODE—SILENCE OF STATUTE—POWER OF COURT.—**The fact that the provisions of the Code of Civil Procedure on election contests are in some respects not applicable to the contest of an election held under the local option law, and that there is no provision made by statute prescribing who

shall represent the people, or how the representative of the people shall be cited or served with process, does not cause such a contest to fail for want of legal parties or procedure, as the court, under the provisions of section 187 of the Code of Civil Procedure, has power to adopt a suitable procedure which will furnish an opportunity for interested parties to appear at the hearing.

**Id.—NECESSITY OF CONTESTER.**—In order to make effective the right of contest it is not necessary that some statute shall designate a contestee selected to represent the public and who must be cited to appear before the court in such proceeding, as it is not in the ordinary sense an adversary proceeding. The public are interested in having a correct determination of the result of the election, and since it is provided that any elector may contest the declared result of the election, it is implied that the court will permit any other elector to oppose such contest so far as necessary for a just and lawful disposition of the proceeding.

**Id.—HEARING OF CONTEST—NOTICE—PUBLICATION IN NEWSPAPER—SERVICE OF CITATION UPON PRESIDENT OF TRUSTEES OF MUNICIPALITY—SUFFICIENCY OF.**—An order directing the publication of notice of the time and place of hearing the contest of an election, held under the local option law, for two weeks in a newspaper published in the city where such election was held, and that service of a citation be made upon the president of the board of trustees of such city, is sufficient.

**APPLICATION** for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the Superior Court of San Diego County from proceeding to enter judgment on the merits in an election contest.

The facts are stated in the opinion of the court.

Wright, Winnek & McKee, for Petitioner.

Luce & Luce, for Respondents.

**CONREY, P. J.**—In this proceeding the plaintiff, an elector of the city of Oceanside, asks for a writ of prohibition directing that the defendants refrain from proceeding to enter judgment on the merits in a certain election contest, and from taking any further steps concerning said contest save and except to dismiss that proceeding.

On the fourteenth day of October, 1915, in the city of Oceanside, a city of the sixth class, an election was held to

vote upon the question whether the sale of alcoholic liquors should be licensed in that city. This election was held pursuant to the provisions of a statute enacted in 1911 (Stats. 1911, p. 599), to provide for the regulation of the traffic in alcoholic liquors by establishing local option. On October 19th, the returns of that election were duly canvassed by the board of trustees of the city, who declared the result to be 217 votes against and 221 votes in favor of licensing such sales. On November 6, 1915, one C. G. Borden, an elector of the city, filed in the superior court of the county of San Diego a complaint in a proceeding entitled, "In the Matter of the Election held in the City of Oceanside, County of San Diego, State of California, on the 14th day of October, 1915, in pursuance of that certain act of the legislature of the State of California known as the 'Wyllie Local Option Act,' " for the purpose of contesting the election upon certain stated grounds of contest; praying for a recount of the ballots and for judgment that the result of the election was not in favor of license, "and that the said board of trustees of said city of Oceanside be ordered to make an entry in its records declaring that the said city of Oceanside is no-license territory." On November 16, 1915, an order was made for a special session of the superior court to be held on the third day of December for the purpose of hearing said election contest. No citation was then issued to any defendant or respondent in that case (none being named in the complaint); but a direction was incorporated in the order that a copy thereof be published in two successive issues of a designated weekly newspaper published in the city of Oceanside; and that publication was made in accordance with the order. On December 3d the court continued the hearing of the contest until December 6th, and on December 4th caused to be issued a citation directed to David Rorick, president of the board of trustees of the city of Oceanside, citing him to appear before the court on December 6th to show cause, if any he had, why contestant should not be granted judgment as prayed for in his petition of contest. The citation was duly served upon Rorick on December 4th, and at the hearing on December 6th Rorick filed an answer protesting that the court had no jurisdiction for any purpose in that case. The court having overruled all objections to its jurisdiction, proceeded to hear the evidence in the matter of said election contest. and will

proceed to enter judgment thereon unless prevented by means of the writ demanded in this proceeding.

The petitioner claims that the superior court is without jurisdiction in the case brought before it; that such jurisdiction does not exist, except so far as conferred by statute, and that the statutory provisions upon which respondents must rely are insufficient to confer the jurisdiction which the superior court is attempting to exercise in that proceeding.

The original jurisdiction of superior courts extends to sundry subjects declared in the constitution, and to "all such special cases and proceedings as are not otherwise provided for." (Cal. Const., art. VI, sec. 5.) This means necessarily that wherever a case, or cause, exists which is outside the scope of those directly mentioned in the provisions vesting jurisdiction in the superior court, and jurisdiction thereof has not been vested in any other court or official body authorized to exercise judicial functions, the jurisdiction to hear and determine such special case is vested in the superior court. In section 9 of the local option election law above cited, we find that "any elector of the territory in which an election under this act is held may contest such election for malconduct on the part of an election board or of any member thereof or on account of illegal votes. Such contest shall be subject to all the provisions of law relating to the contesting of elections, so far as the same may be applicable. . . ."

The right of contest being thus created and there being no other court vested with jurisdiction over the matter, it follows that by virtue of the constitution and the statute, the subject matter of any contest arising under the local option act is a special case within the jurisdiction of the superior court. There are no statutory provisions outlining a procedure for election contests, except as found in section 1111 et seq. of the Code of Civil Procedure. Those sections furnish a procedure for contesting the right of any person declared elected to an office to be exercised in any county, city and county, city, or any political subdivision of either. They contemplate an adversary proceeding in which the contestee is one who has been declared elected to an office, and he is to be brought before the superior court by means of a citation issued and served after an order providing for a special session of court to hear the contest. The petitioner

herein contends that the provisions of the Code of Civil Procedure are not applicable to a contest relating to a question submitted to the electors other than one including the election of a public officer; that there being no contestee, the provisions for citation and service as set forth in section 1119 of the Code of Civil Procedure cannot be applied to the case. He directs attention to the fact that the public is the real party in interest in such a proceeding, and claims that because there is no provision anywhere made by statute prescribing who shall represent the public, or how the representative of the public shall be cited or served with process, the attempted contest must fail for want of legal parties or procedure. Cases are not wanting which tend to support the argument thus made. Among these, and very strongly relied upon, are *Beason v. Shaw*, 148 Ala. 544, [18 L. R. A. (N. S.) 566, 42 South. 611]; *Kehr v. City of Columbia*, 136 Mo. App. 322, [116 S. W. 428]. While appreciating the force of these decisions, it is our opinion that, in view of a further provision of statutory law in California, they should not have controlling effect here. If the code sections concerning election contests do not apply to the case presented by a local option question, it does not follow that there is no possible procedure. The right to contest the election has been conferred by the same statute which authorized the election to be held. An elector claims to have been aggrieved (as one of the public therein concerned) by an erroneous declaration of the result of the election. The alleged grievance is therefore a special case entitled to be heard, and the jurisdiction to hear and determine that case is vested in the superior court. The only obstacle remaining in his way is found in the fact that no procedure applicable to the case has been prescribed by statute. Under such circumstances it is necessary to inquire what are the powers of the superior court with respect to the mode of proceeding.

Section 187 of the Code of Civil Procedure provides as follows: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit



of this code." We are inclined to agree with counsel for petitioner, that the code provisions on election contests to which we have referred are in some respects not applicable to the contest of an election held under the provisions of the so-called Wyllie Act. But we do not think that, in order to make effective the right of contest, it is necessary that some statute shall designate a contestee selected to represent the public and who must be cited to appear before the court in such contest proceeding. It is not in the ordinary sense an adversary proceeding. The public—that is to say, the people of the city of Oceanside—are interested in having a correct determination of the result of the election, and since it is provided that any elector may contest the declared result of the election, it is implied that the court will permit any other elector to oppose such contest so far as necessary for a just and lawful disposition of that proceeding. Under section 187 of the Code of Civil Procedure, it devolves upon the court in such a case to adopt a suitable procedure which will furnish an opportunity for any interested person to appear at the hearing. This the court attempted to do by providing for the publication in a newspaper of the city, of a notice of the time and place when the case would be heard. This alone, in our opinion, was a sufficient compliance with the law as to procedure. The court acquired its jurisdiction of the case upon the filing of the complaint, and it was entitled to exercise that jurisdiction by the appropriate means which it selected. The court further recognized the existence of the city government as a body in some respects representing the people of the city, and caused service of a citation to be made in a manner similar to that which is required for the service of a summons where the city is a party defendant in an action. (Code Civ. Proc., sec. 411, subd. 5.) Where the power of judging of the election of city officers is vested in a city council, and there is no statute prescribing any details of procedure to be followed by the council, that body may adopt any mode which preserves to the parties the fundamental essentials of notice and hearing. (*McGregor v. Board of Trustees*, 159 Cal. 441, 445, [114 Pac. 566].) If this power to prescribe details of procedure is so liberally allowed to a municipal body when exercising functions of a judicial nature, it would be difficult to understand why like discretion should be denied to a superior court. The contention

on behalf of petitioner seems to be that, even if the court had jurisdiction of the subject matter of the contest, there was a lack of necessary parties and of jurisdiction acquired over those parties; and that the provisions of section 187 of the Code of Civil Procedure do not include any grant of authority to adopt process for the purpose of bringing before the court the necessary parties. But we think that, since the court had jurisdiction of the subject matter, and since the necessary parties, namely, the local public and its members, were clearly pointed out by the nature of the case, the authority given by section 187 included the right to bring those parties before the court by any suitable process which appeared to be most conformable to the spirit of the code. This having been done, the court had jurisdiction to proceed with the case.

The petition is denied.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 1, 1916.

---

[Civ. No. 1635. First Appellate District.—April 12, 1916.]

LOUIS GAMBETTA, JR., a Minor, by Clara A. Clivio, His Guardian ad Litem, Respondent, v. LOUIS GAMBETTA, SR., Appellant.

**PARENT AND CHILD—SUPPORT OF ILLEGITIMATE CHILD—CONSTRUCTION OF SECTION 196A, CIVIL CODE.**—Section 196a of the Civil Code provides, in the alternative, that an action to compel the father of an illegitimate child to support it may be brought either by the mother or the guardian of the child, and the mother not having chosen to bring the suit herself, it may be brought and maintained by the child through his guardian, either general or *ad litem*.

**ID.—AMOUNT OF ALLOWANCE—WHEN THE DETERMINATION OF THE TRIAL COURT CONCLUSIVE.**—In an action to compel a father to support an illegitimate child, where the trial court, with the pleadings and facts as to the financial ability of the respective parents before it, ordered the father to contribute twenty-five dollars per month



to the support of the child, the appellate court will not on appeal interfere with the amount of the allowance.

1D.—**SUFFICIENCY OF COMPLAINT.**—In such a case, where the complaint shows that the parents of the child were not married at the time of his birth, and that they have not since that time been married, the contention that the complaint is insufficient in that for aught that appears in it the defendant and the mother of the child may have been married at the time the child was conceived, and that therefore he is not illegitimate, is not sufficient for a reversal, although the complaint may be ambiguous and uncertain in this respect, where the evidence showed that the defendant is the father of the child and the latter's mother has never been married, and counsel for defendant admitted at the oral argument that "the plaintiff is a bastard."

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

J. A. Gendotti, and C. J. Houston, for Appellant.

Jewel Alexander, for Respondent.

**KERRIGAN, J.**—This is an action brought by the plaintiff through his guardian *ad litem* to compel his father, the defendant, to support him, he being a minor child. The action is founded on section 196a of the Civil Code, which reads: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

In the trial court a demurrer to the complaint was overruled, whereupon the defendant having refused to answer, his default was entered; and after hearing testimony introduced on behalf of the plaintiff the court rendered judgment against the defendant, who now prosecutes this appeal therefrom.

The evidence showed that the plaintiff was born in San Francisco in the year 1913; that he is the illegitimate child of the defendant and a young woman who is employed as a

domestic; that when employed she earns \$35 per month; that the child is boarded out and that the sum of twenty dollars per month is required for his board and lodging, which sum does not cover, as we understand the record, other expenses such as for clothing and medical attendance. The evidence also shows that the defendant is a hotel-keeper, owning property of the value of between three thousand dollars and four thousand dollars and having an income of one hundred and fifty dollars to two hundred dollars per month, and that he has contributed nothing toward the support of his child. Upon the conclusion of the case the court determined that \$25 per month should be contributed by the defendant for the support, maintenance, and rearing of the child, and the judgment provided for this payment.

There is no merit in the point that the mother of the child, being alive and sane, should have brought the action in her own name. The section reads in the alternative—"by his mother or guardian"; and the mother not having chosen to bring the suit herself, it might be brought and maintained by the child through his guardian, either general or *ad litem*. (Code Civ. Proc., sec. 372; *Lewis v. Lewis*, 22 Cal. App. Dec. 607, [decided by this court, third appellate district, March 16, 1916]; *In re Cahill*, 74 Cal. 52, [15 Pac. 364]; 15 Am. & Eng. Ency. of Law, 6; 21 Cyc. 19; 22 Cyc. 634.)

Equally without merit is the point urged that the court imposed the whole duty of the child's support upon his father, the defendant. With the pleadings and facts as to the financial ability of the respective parents before it, the court made such a decree as under all the circumstances of the case seemed to it meet and proper; and we are not in a position, nor are we disposed, to interfere with the conclusion of the trial court upon that subject.

The appellant makes in all seventeen points for the reversal of the decree, but those discussed by us are the ones that seem to possess the most merit. Chief of these is the contention that the complaint fails to state facts sufficient to constitute a cause of action.

The allegations of the complaint thus assailed show that the parents of the child were not married at the time of his birth and that they have not since that time been married; and defendant argues that for aught that appears in the complaint the defendant and the mother of the child may

have been married at the time the child was conceived, and that therefore he is not illegitimate.

While, perhaps, the complaint, measured by the strictest rules of pleading, might be regarded as ambiguous and uncertain in the respect pointed out, still we think it can hardly be said to wholly fail to state sufficient facts. It is certain that it sets forth facts enough to enable the defendant to sufficiently understand the issues tendered by the pleading and to meet it by proper and full denials. Under the allegations of the complaint the defendant is the father of the plaintiff, and whether legitimate or illegitimate, defendant is liable for his support. We would leave the discussion here were it not a fact that the remedies provided by section 196a, and those sections of the code permitting legitimate children to maintain actions against parents for support, are different, the difference being that in proceeding under section 196a to compel the support of an illegitimate child, the mother as such in her own name may maintain the action, and that it is in the power of the court to impound the property of the parent as security for the payment required by its decree. (Civ. Code, sec. 196a.) But conceding for the sake of argument that the point is meritorious, still we think the defect in the complaint is cured by the evidence introduced upon the hearing. The defendant having failed to answer, he could have taken his appeal upon the judgment-roll alone, but he has included the evidence in the record upon appeal (as he had a right to do—Code Civ. Proc., sec. 950), and it being before us, we doubtless may consider it. According to the evidence, the defendant is the father of the plaintiff and the latter's mother has never been married. In addition to this, counsel for the defendant admitted and asserted at the oral argument that "the plaintiff is a bastard." Under these circumstances, to reverse the decree because of the alleged defect in the complaint would be to accord more consideration to a technical error of pleading than is warranted in view of the recent amendment to the constitution relating to judicial procedure.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 8, 1916.



[Civ. No. 2029. Second Appellate District.—April 12, 1916.]

**W. C. AUSTIN, Petitioner, v. BENJAMIN C. STRANG,**  
**Justice of the Peace, Respondent.**

**STATUTORY CONSTRUCTION—EFFECT TO BE GIVEN EVERY PART OF STATUTE.**—It is a cardinal rule of interpretation of statutes that effect, if possible, must be given to every clause and part thereof.

**JUSTICE'S COURT—FEES—CONSTRUCTION OF SECTION 4300E, POLITICAL CODE.**—By section 4300e of the Political Code, the legislature has, for the purpose of fixing the fees of a justice of the peace, classified the services which may be rendered into three groups, as to each of which a specific fee is fixed for services performed; that is, two dollars is required to be paid for all services performed by him before trial; if there be a trial, an additional three dollars shall be paid; if there be no trial, and the justice be called upon to render and enter judgment by default, an additional fee of two dollars shall be paid covering such services; and it is a prerequisite to the rendition and entry of a judgment of default to exact the payment of a fee of two dollars, which covers the cost, not only of the rendition and entry of such judgment, but also services subsequent thereto, including the issuance of an execution and satisfaction of judgment.

**APPLICATION** originally made in the District Court of Appeal for the Second Appellate District for a Writ of Mandate to compel a justice of the peace to enter judgment by default.

The facts are stated in the opinion of the court.

**A. R. Jamieson, for Petitioner.**

**Simpson, Moody & Simpson, for Respondent.**

**SHAW, J.**—In this proceeding the petitioner seeks a writ of mandate directed to Benjamin C. Strang, in his official capacity as justice of the peace of Pasadena township, directing him to enter a judgment by default in favor of petitioner in a certain action pending in the court of said justice, wherein petitioner is plaintiff and J. R. Robinson and wife are defendants.

It appears that petitioner at the time of filing his complaint in said justice's court paid the filing fee of two dollars;

that summons was issued and duly served upon defendants therein named; that the time for answering said complaint having expired and no answer or other plea to said complaint being interposed by defendants, plaintiff demanded of said justice that he enter a default judgment against said defendants; that said justice, conceding that plaintiff was entitled thereto, nevertheless refused to enter the same except upon payment made by plaintiff of a fee of two dollars in addition to that theretofore paid upon the filing of the complaint, which petitioner refused to pay.

The contention of petitioner is that this additional fee demanded by the justice for the rendition and entry of judgment by default is without warrant of law. Both parties base their contentions upon section 4300e of the Political Code, as amended in 1913, [Stats. 1913, p. 1442], which is as follows: "For all services to be performed by him before trial, in a civil action, two dollars; and for the trial of either a question of law or fact, and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of judgment and issuance of execution thereon, three dollars, to be paid when such trial is calendared for hearing; and for the rendition and entry of judgment by default or confession, and services subsequent thereto, including execution and satisfaction of judgment, two dollars."

Prior to the amendment, the third clause of the statute above quoted read as follows: "And in all cases where judgment is rendered by default or confession, for all services, including execution and satisfaction of judgment, two dollars." We must assume that the legislature had some purpose in thus amending the law under which petitioner concedes that justices made no such charge as that here made. Moreover, it is a cardinal rule of interpretation of statutes that effect, if possible, must be given to every clause and part thereof. If we accept petitioner's construction, that the fee of two dollars provided as compensation for all services to be performed before trial covers the cost for rendition and entry of judgment by default, then the third clause of the statute is given no effect whatever, and its adoption was an idle act.

As we construe the statute, the legislature has, for the purpose of fixing the fees of a justice, classified the services which may be rendered into three groups as to each of which

a specific fee is fixed for services performed. Thus, two dollars is required to be paid for all services performed by him before trial. If there be a trial, an additional three dollars shall be paid; if there be no trial, and the justice be called upon to render and enter judgment by default, an additional fee of two dollars shall be paid covering such services. The services are itemized under three heads and a separate fee fixed for each class of items.

We are clearly of the opinion that it was the duty of respondent, as a prerequisite to the rendition and entry of judgment of default demanded by plaintiff in said action, to exact the payment of a fee of two dollars, which, as provided, covered the cost, not only of the rendition and entry of such judgment, but for all services subsequent thereto, including the issuance of an execution and satisfaction of judgment.

The petition for a peremptory writ of mandate as prayed for is denied, and the proceeding dismissed.

Conrey, P. J., and James, J., concurred.

---

[Crim. No. 618. First Appellate District.—April 12, 1916.]

THE PEOPLE, Respondent, v. FRANK TERRAMORSE,  
Jr., Appellant.

CRIMINAL LAW—LARCENY—INADVERTENT REMARK OF COURT—ADMONITION TO DISREGARD—MISCONDUCT NOT PREJUDICIAL.—In a prosecution for larceny, where the evidence offered in support of the charge tended to show that the defendant had entered into certain meretricious relations with the wife of the complaining witness during the absence of the latter from home, and that it was during the existence of such relationship that the crime was committed with the connivance and consent of the wife, no prejudice is suffered by the defendant from a remark made by the court during argument of counsel as to the admissibility of certain evidence tending to show adulterous relationship, to the effect that the defendant had "tried" to establish such intimacy in another way, where the court, immediately upon its attention being called to its inadvertent remark, instructed the jury to disregard it.

1D.—ADULTEROUS RELATIONSHIP—EVIDENCE—ORDER STRIKING OUT TESTIMONY—INSTRUCTION TO DISREGARD—LACK OF PREJUDICE.—Error

in the admission of testimony which the prosecution claimed tended in some degree to show the existence of adulterous relations between the defendant and the wife of the complaining witness is cured, where such testimony is subsequently stricken out and the jury instructed to disregard it.

**ID.—PREJUDICIAL MISCONDUCT OF DISTRICT ATTORNEY—IMPROPER QUESTIONS.**—It is prejudicial misconduct for the prosecuting officer to ask a character witness for the defendant if the defendant had not been dishonorably expelled from a fraternal organization of which the witness was a member, after objections to five previous questions, all relating to the same matter, had been sustained on the ground that such matter related to a time subsequent to the commission of the crime in question.

**ID.—ARGUMENT TO JURY—PREJUDICIAL MISCONDUCT.**—It is also prejudicial misconduct for the prosecuting officer to comment upon the fact that the defendant had refused to permit his wife to be a witness in the case, where the record shows that the attitude of his wife was antagonistic to the defendant.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

A. S. Newburgh, and George J. McDonough, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**RICHARDS, J.**—This is an appeal from a judgment of conviction of the defendant of petit larceny, and from an order denying a new trial.

The defendant was charged with the crime of grand larceny, consisting in the alleged larceny of a diamond scarf-pin, cuff-links, a silver portrait frame, a suitcase, a revolver and certain articles of wearing apparel, the property of one J. B. Molera. The evidence offered in support of the charge tended to show that the defendant had entered into certain meretricious relations with the wife of said Molera during the absence of the latter from his home on a trip to Alaska, which culminated in the defendant and Molera's wife going off to New York together, and that it was while these relations existed and this trip was taken by the pair that the above-

mentioned articles, the separate property of the husband, were appropriated by the defendant with the connivance and consent of the wife.

The nature of the case as thus outlined required the presentation of proof as to the adulterous relations between the defendant and the wife of Molera, involving not only a large volume of evidence in support of the theory of the case held by the prosecution, but also involving almost constant clashes between opposing counsel as to the relevancy and admissibility of particular portions of such evidence, with the result that upon this appeal the main issues presented arise out of the alleged misconduct of the court and of the prosecuting officer occurring during the trial and argument of the cause.

The alleged misconduct of the court upon which the appellant relies occurred during the course of a dispute between counsel as to the admissibility of certain evidence, which it was claimed by the prosecution tended to show adulterous relations between the defendant and the wife of Molera. The court was inclined not to admit the particular piece of evidence sought to be elicited, and did not in fact permit its introduction, but in the course of the discussion the following occurred:

"Mr. Smith: I want to show that he made a gift of it, but we will prove that he stole the property and she got possession of it, and we will show how she got possession of it.

"The Court: That would not tend to prove any of the issues in this case. He is not charged with having stolen any of these particular pieces of jewelry.

"Mr. Smith: We have a right to show intimacy; we have a right to show adulterous relations existing between this defendant and Mrs. Molera.

"The Court: You have established that in some other way.

"Mr. Newburgh: You mean he tried to establish it in some other way.

"The Court: Yes; but not in this particular manner. I don't think that would be proper testimony.

"Mr. Newburgh: That is right.

"Mr. Smith: I will show you what purports to be a promissory note dated December—

"Mr. McDonough (Interrupting): Just one second. In order to keep the record straight, and with all due respect, we assign the remark of your Honor to a reply made by Mr.

Smith—a reply made by your Honor, as being prejudicial to the rights of the defendant, and specify it—

“The Court (Interrupting): I will instruct the jury that any statements addressed by the court to counsel—

“Mr. McDonough: We concede, if your Honor please, that you inadvertently made that statement.

“Mr. Newburgh: Inadvertently, yes.

“Mr. Smith: The court corrected himself immediately afterward.

“The Court (to the Jury): Any remarks I address to counsel should not be considered by you in your deliberations. If I made a statement which has gone beyond the evidence or a rational discussion of the evidence, it is your duty to disregard it. My remarks were addressed to counsel and not to the jury.”

It is quite evident, and in fact it is conceded, that the remark of the court, while an improper reference to the state and effect of the evidence, was inadvertent, and was addressed to counsel in the course of a legal argument, and that the court immediately, upon its attention being called to its unguarded remark, instructed the jury expressly and emphatically to disregard it. This prompt and decided action on the part of the court was sufficient, in our opinion and under the circumstances of the particular case, to correct its inadvertent act and to remove from the minds of the jury any effect prejudicial to the defendant which might have been caused thereby.

The appellant also assigns certain rulings of the court during the course of the trial as error, and calls particular attention to two specific instances of such alleged error. The first of these occurred during the examination of a witness named Anna Pufahl, with relation to certain interviews between herself and the defendant, which the prosecution claimed tended in some degree to show the existence of adulterous relations between the defendant and Molera's wife. The court at first admitted the evidence, but finally became satisfied that it was too remote, and granted the defendant's motion to strike out the entire testimony of this witness. This motion was concurred in by the prosecution, and the court in striking out the evidence expressly instructed the jury to disregard and dismiss from their minds the objectionable testimony. It is to be assumed, in the absence of some showing to the

contrary, that the jury regarded this instruction, and that the error of the court, if any, in its admission was thereby cured.

It is also contended by the appellant that the court erred in regard to the admission of evidence as to certain contents of the defendant's trunk after his return from New York. The defendant had been called in his own behalf and had given evidence as to the presence of certain articles of clothing in his trunk. On cross-examination by the prosecution he was asked as to whether certain other articles were not also in the trunk. We think the prosecution was entitled to pursue the examination of the defendant as to the entire contents of his trunk, a portion of which had been identified by him; and the mere fact that the articles concerning which the inquiry was made were such as reflected no credit upon him, would not of itself justify a restriction of the examination.

The chief contention of the defendant upon this appeal relates to a number of instances of alleged misconduct on the part of the prosecuting officer during the trial and argument of the case. The first of these occurred during the cross-examination of one Bozie, a character witness for the defendant, to whom six questions were asked, all relating to the trial and expulsion of the defendant from a lodge of which the witness was a member. To the first five of these questions the defendant's objection was sustained upon the ground that it had reference to events occurring after the defendant had been charged with this crime; no assignment of misconduct was made to the asking of these five questions, but when the prosecuting officer, knowing, as the record affirmatively shows he did know, that the whole matter being inquired into related to a time after the defendant's reputation had been brought into question by the charge of this crime, asked this question: "This defendant at that trial was dishonorably expelled from the order, wasn't he?" he committed a gross breach of misconduct which counsel for the defendant tempestuously assigned as such, and asked the court for an instruction to that effect to the jury. The prosecuting officer, unchastened by the assignment, proceeded to excoriate defendant's counsel for losing their temper, and asked the court to instruct the jury to disregard the latter's remarks in making the assignment. The court thereupon instructed the jury



to disregard the remarks of both counsel, having evident reference to the interchange of discourtesies which had just transpired, but which neither amounted to a rebuke of the prosecuting officer for persisting in an improper inquiry, nor to an admonition not to pursue such inquiry further; for almost immediately the cross-examiner returned to the subject by asking the same witness whether the defendant now belonged to the order from which his previously unanswered question conveyed the suggestion to the jury that he had been ignominiously expelled. This question was also assigned as misconduct, and a repetition of the former offense, which the admonition of the court to the jury to disregard the personal views or opinions of counsel would neither reach nor cure. The purpose of the prosecuting officer in persisting in this inquiry was all too plainly to get before the jury the fact, or at least the suggestion, that the defendant had been expelled from a fraternal order upon charges involving moral turpitude, and thus to further discredit him before the jury.

It would be a dangerous precedent to permit such a purpose to go unproved. (*People v. Wells*, 100 Cal. 459, [34 Pac. 1078]; *People v. Pang Sui Lin*, 15 Cal. App. 262, [114 Pac. 582], and cases cited.)

Several other instances of alleged misconduct on the part of the prosecuting officer in the course of the examination of witnesses are called to the court's attention, but no assignment of misconduct was made.

Upon the argument of the cause the prosecuting officer undertook to comment to the jury upon the fact that the defendant had refused to permit his wife to be a witness in the case. The record shows that the defendant's wife was called to the witness-stand by the prosecution, and stated that she was willing to testify, but that when the defendant was asked to consent that she might become a witness he stood mute. During the argument of the case defendant's counsel had made some reference to the defendant's wife, whereupon, in his reply, the prosecuting officer spoke as follows:

"Mr. Smith: Gentlemen of the jury, Mr. McDonough in his argument spoke of the defendant's wife in this case; he spoke about her and the clothes she had been wearing; he commented about the different hats that she had, but, gentlemen of the jury, she was on the witness-stand. Why didn't they ask her where she got the hats and where she got

the coats? No. He stood upon his constitutional rights. We were willing to put her on the stand, and she was willing to testify, but without the consent of the defendant, of course, we could not examine her, so she left the stand."

The record discloses that the attitude of the defendant's wife toward him was antagonistic. In declining to consent that she should be a witness against him the defendant was standing as strictly upon his legal rights as he would have been had he declined to be a witness himself, and he was equally entitled to the application of the rule that his declination to permit his wife to be a witness should not in any manner prejudice him or be used against him on the trial. (*People v. Heacock*, 10 Cal. App. 456, [102 Pac. 543].) In making the foregoing comment the prosecuting officer was guilty of prejudicial misconduct which counsel for the defendant immediately called to the attention of the court, and requested that the jury be instructed to disregard it. The court did not give such an instruction as the defendant asked and was entitled to have given.

Had the trial of this cause proceeded with that degree of decorum and courtesy which should regulate the conduct and attitude of respective counsel in the trial of causes in courts of justice, the two instances of misconduct on the part of the prosecuting officer to which we have referred might not have been sufficient in themselves to warrant a reversal and justify the retrial of this cause, particularly in view of the fact that the defendant was only found guilty of petty larceny; but a reading of the entire—and much too voluminous—record discloses a degree of persistence on the part of the prosecuting officer in the repetition of questions clearly objectionable, and evidently intended to discredit and degrade the defendant and his witnesses in the eyes of the jury, which should not have the approval which would attend the affirmance of a verdict in some measure doubtless influenced by them. Nor should the fact that counsel for the defendant was also seriously at fault in repeated and exasperating objections to the admission of evidence which was clearly competent as supporting the prosecution's theory of the case, much as such conduct is to be deprecated, suffice to furnish an excuse for the misconduct of the prosecuting officer. The only method which this court knows for preventing the spread of such

abuses is that of compelling the retrial of causes in which they occur.

Judgment and order reversed.

Lennon, P. J., and Kerrigan, J., concurred.

---

[Civ. No. 1921. Second Appellate District.—April 18, 1916.]

FRANK BLOOD, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al., Respondents.

**WORKMEN'S COMPENSATION ACT—CONSTRUCTION OF—CASUAL EMPLOYEE.**

The Workmen's Compensation, Insurance, and Safety Act does not include a person whose employment is casual and not in the usual course of the trade, business, profession, or occupation of his employer; and one employed to apply two coats of paint to the house of his employer, the employer to furnish the painting materials and the employee to receive a certain amount *per diem*, the employment not being for any definite period of time, but the work being such as would reasonably be done within two weeks, is not entitled to recover for accidental injuries sustained the first day of his employment, resulting in temporary total disability, and the Industrial Accident Commission has no jurisdiction to award compensation for such injuries.

**Id.—DEFINITION OF "CASUAL."**—The ordinary signification of the word "casual" is something which comes without regularity, and is occasional and incidental, as distinguished from "regular," "systematic," "periodic," and "certain."

**APPLICATION** originally made in the District Court of Appeal for the Second Appellate District for a Writ of Certiorari to review an award made by the Industrial Accident Commission.

The facts are stated in the opinion of the court.

James R. Choate, and W. C. Shelton, for Petitioner.

Christopher M. Bradley, for Respondents.

**CONREY, P. J.**—This is a proceeding in *certiorari* to review an award made by the Industrial Accident Commission.

The petitioner, Frank Blood, owned a two-story frame building at Huntington Park, in Los Angeles County, consisting of a storeroom below and two flats above, one of the flats being occupied by the owner. Blood employed one W. F. Heck, a house painter by trade, to apply two coats of paint to the house. Blood was to furnish the painting materials and pay Heck at the rate of \$3.50 per day. The employment was not for any definite period of time, but the evidence shows that the work would reasonably have been done within two weeks. During the first day of his employment Heck was accidentally injured and suffered a temporary total disability, on account of which an award in his favor was made by the commission.

On behalf of petitioner it is contended that in making any allowance whatever the commission acted in excess of its jurisdiction, because the employment of the applicant for compensation was "both casual and not in the usual course of the trade, business, profession, or occupation of his employer." (Workmen's Compensation, Insurance, and Safety Act, sec. 14, [Stats. 1913, p. 284].) We think it must be conceded that the employment was not in the usual course of any business of the employer. There is absolutely no evidence that Blood was engaged in any business which in its usual course, if at all, called for the employment of house painters.

Under the British Workmen's Compensation Act of 1906, the word "workman" "does not include a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business." As to both clauses within the quotation, it will be observed that there is a material difference between the language used in the British act and that of the California statute. Commenting upon a very similar difference between the Massachusetts and the British acts, the supreme court of Massachusetts has said that this difference in phraseology must be regarded as deliberately designed, and that its effect is to narrow the scope of the Massachusetts act as compared with the English act. "No one whose employment is 'casual' can recover here, while there one whose employment is 'of a casual nature' comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may

be founded upon the difference between the modifying word 'casual' used in our act, and the words 'of a casual nature' in the English act. The phrase of our own act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of decision in *Knight v. Bucknill*, 6 B. W. C. C. 160 (1913); W. C. & Ins. Rep. 175; 57 Sol. Jo. 245." (*In re Gaynor*, 217 Mass. 86, [L. R. A. 1916A, 363, 104 N. E. 339].) In the same Massachusetts decision it is noted that the ordinary signification of the word "casual," as shown by the lexicographers, is something which comes without regularity, and is occasional and incidental; that its meaning may be more clearly understood by referring to its antonyms, which are, "regular," "systematic," "periodic," and "certain." Tested by this distinction, the contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract, not constituting or connected with any regular, systematic, periodic, or certain business.

The supreme court of Massachusetts afterward referred to the Gaynor case as follows: "In addition to what was said there it may be of importance (in determining whether in a particular case the 'employment is but casual') to have in mind the reason for this limitation upon the class of persons who are entitled to the benefits of the Workmen's Compensation Act. The scheme created by the Workmen's Compensation Act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employees. It may have been thought impracticable to work out a scheme of insurance if persons who are only occasionally employed are to be included among those insured." (*In re Cheevers*, 219 Mass. 244, [106 N. E. 861].)

It appears to us that the Massachusetts decisions we have referred to are based upon sound reasoning, and may well be applied in the interpretation of our own statute. We, therefore, have reached the conclusion that the employment of the applicant Heck named in the proceedings here under review was of a nature which did not entitle him to compensation for his injury.

In view of the preceding decision, it is not necessary for us to consider petitioner's other propositions; which were (1), that the amount of the award was determined under a section of the statute which is not applicable to the case, and (2) that the award was procured by fraud.

The award under review is annulled.

James, J., and Shaw, J., concurred.

---

[Civ. No. 1595. First Appellate District.—April 14, 1916.]

**HANNAH ROSENTHAL et al., Appellants, v. L. BAUER et al., Defendants; NATIONAL BREWING COMPANY (a Corporation), Respondent.**

**GUARANTY—PAYMENT OF RENT RESERVED IN LEASE—CONSTRUCTION.—**

A guaranty attached to a lease of real property for the period of ten years at a monthly rental of six hundred dollars for the first five years and seven hundred dollars for the second five years, which indemnifies the lessors for a breach of the covenant to pay the rent reserved "in the sum of thirty-six hundred dollars," and a resolution authorizing the execution of such guaranty by the corporation guarantor, which provides that such guaranty be executed "for the sum of \$3,600, being for six months' rent at \$600 per month," are to be construed as covering only against defaults by the lessees during the first five years, when the rent was six hundred dollars per month.

**Id.—CONTRACT—REPUGNANCIES—HOW INTERPRETED.—**The repugnancies of a contract must be reconciled, if possible, by giving to them such an interpretation as will make them effective and at the same time subordinate to the general intent and purpose of the contract considered and construed in its entirety.

**Id.—INCONSISTENT WORDS AND PHRASES—WHEN REJECTED.—**Particular words and phrases in a contract may, for the sake of interpretation, be rightly rejected only when they are inconsistent with its apparent purpose and the obvious intent of the parties.

**Id.—ACTION FOR RECOVERY OF RENT—EVIDENCE—CIRCUMSTANCES SURROUNDING EXECUTION OF GUARANTY—HARMLESS ERROR.—**In an action brought against the lessees and the guarantor to recover unpaid rent, error, if any, in the ruling sustaining an objection to a question propounded to a witness by plaintiff's counsel, calling for the circumstances attending the execution of the guaranty, was harmless, where subsequently all of the circumstances preceding and attending the execution of the lease, the original guaranty, and the resolution was admitted in evidence without objection.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Charles A. Shurtleff, and J. G. De Forest, for Appellants.

Marcus Rosenthal, for Respondent.

**LENNON, P. J.**—On July 12, 1906, the plaintiffs, as lessors, and the defendants Bauer and Sachau, as lessees, entered into a lease of certain real property for a period of ten years from the date of the acceptance of a building to be erected upon the real property, at a monthly rental of six hundred dollars for the first five years and seven hundred dollars for the remaining five years. The lessors insisted upon a guaranty for the payment of the rent reserved, and accordingly the lessees Bauer and Sachau procured a written guaranty, expressed upon a separate paper, purporting to be signed by the National Brewing Company, which was attached to the lease, and which was in the following words and figures:

"Know all men by these presents that for and in consideration of the execution of the within lease by the parties of the first part, and in consideration of one dollar to it paid, the undersigned, the National Brewing Company, a corporation, duly incorporated under and by virtue of the laws of the State of California, does hereby guarantee to said lessors, parties of the first part, the payment of the rent reserved in said lease and the performance of the covenants and conditions to be performed by the parties of the second part, in the sum of thirty-six hundred (\$3,600) dollars; and hereby agrees that it will indemnify said lessors, parties of the first part, in said sum against any loss or damage which they or either of them might incur by reason of the breach of any of the covenants of said lease by said parties of the second part.

"Dated July —, 1906.

"NATIONAL BREWING Co.

"By GEORGE F. VOLZ,

"Secretary."

The lessors expressed dissatisfaction with the guaranty thus drawn and delivered in so far as it failed to reveal the corporate authority for its execution, and returned it to the secretary of the corporation defendant with the request that the authority for its execution be evidenced by a resolution of the board of directors of said corporation. Thereupon the board of directors of said defendant adopted and expressed upon a separate paper, which was attached to the lease and guaranty as originally drafted, the following resolution:

"San Francisco, Cal., July 12, 1906.

"At a special meeting of the board of directors of this association, held at this office 7262 Fulton street, at 9 o'clock A. M. July 12, 1906, it was resolved that the secretary of this corporation be authorized to sign that certain guaranty on lease of L. Bauer and John Sachau with Hannah Rosenthal, Amelia Waterland, Fannie Bernard and Rose Oser, for the sum of \$3,600, being for six months' rent at \$600 per month.

"There being no further business it was resolved to adjourn.

"GEORGE F. VOLZ, (Seal)

"Secretary."

After the execution and delivery of the lease in question, with the guaranty as originally drafted and the resolution attached thereto, the tenants Bauer and Sachau, on the nineteenth day of January, 1907, when the building referred to in the lease was completed and accepted, entered into the possession of the demised premises, and paid rent under the terms of the lease to July 13, 1913, after which date they refused to pay further rent. Plaintiffs brought this action against Bauer and Sachau, as lessees, and the National Brewing Co. as guarantor, to recover seven hundred dollars, the rent from July 19th to August 19th, under the terms of the lease, which provided that during the second five years the rent reserved should be in that amount. The defendants Bauer and Sachau defaulted, and judgment was rendered and entered against them in favor of the plaintiffs, but, upon the issue of the guaranty judgment was rendered in favor of the corporation defendant, and the appeal is by plaintiffs from that judgment and from an order denying a new trial.

The appeal comes here on the judgment-roll and a statement of the case. The statement, however, does not purport



to present all of the evidence adduced upon the trial of the case, and apparently is limited to a recital of "the evidence concerning the relative time of the execution of the guaranty and the certificate of resolution."

In addition to alleging the execution of the lease and the breach by the defendants Bauer and Sachau of the covenant to pay the rent reserved therein for the month above mentioned, the plaintiff's complaint for cause of action against the corporation defendant, pleaded and relied upon the alleged execution and delivery of the guaranty in the sum of three thousand six hundred dollars as originally drafted, and made no reference to the resolution of the corporation defendant authorizing and embodying a guaranty for the payment of six months' rent at six hundred dollars per month. The answer of the defendant denied the execution and delivery of the guaranty as originally drafted and pleaded in the plaintiff's complaint, and then averred that although it had authorized a guaranty to the plaintiffs for the payment of the first six months' rent reserved under the lease in the sum of three thousand six hundred dollars, yet such guaranty had never been executed and was never delivered to the plaintiffs.

The trial court in its findings of fact, after finding the execution of the lease and the breach of the covenant to pay the rent reserved in the sum of seven hundred dollars for the month commencing July 19, 1913, and ending August 19, 1913, in effect found that the original guaranty and the resolution were attached to the lease when it was finally delivered to plaintiffs; that the original guaranty and the resolution were executed by and between the same parties; that the subject matter of the lease was the same, and that they and the lease were parts of substantially one transaction.

It is conceded that these findings necessarily involve the implied finding that the original guaranty and the resolution constituted but a single contract of guaranty. (Civ. Code, sec. 1642.)

These are the fundamental findings in the case; and whether or not they support the judgment is the primary question presented upon the appeal. The determination of that question depends upon the construction to be given to the contract of guaranty. Evidently the trial court construed it to mean that the corporation defendant had thereby obligated itself to guarantee only the payment of the rent re-

served for six months during the first five years of the lease not to exceed the sum of three thousand six hundred dollars, at six hundred dollars per month; that is to say, the trial court in effect found that the corporation defendant, by its contract of guaranty, only obligated itself to indemnify the plaintiffs against such default in the lessees' payment of the rent reserved as might occur during the first five years of the lease, when the rent reserved was fixed at six hundred dollars per month.

This, we think, is the correct construction to be given to the guaranty. We cannot bring ourselves to agree with the construction contended for by counsel for the plaintiffs, to the effect that the guaranty contemplated and covered any default of the lessees in the payment of the rent reserved without regard to whether such default occurred during the first five years, when the rent was fixed at six hundred dollars per month, or during the second five years, when the rent was fixed at seven hundred dollars per month. This construction of the guaranty cannot be sustained without doing violence to the general rule of construction which requires that the repugnancies of a contract must be reconciled, if possible, by giving to them such an interpretation as will make them effective and at the same time subordinate to the general intent and purpose of the contract considered and construed in its entirety. (Civ. Code, sec. 1652.) Particular words and phrases in a contract may, for the sake of interpretation, be rightly rejected only when they are inconsistent with its apparent purpose and the obvious intent of the parties. (Civ. Code, sec. 1654.) That clause of the resolution which limits the liability of the corporation defendant for the lessees' default in the payment of the rent reserved to "six months at six hundred dollars per month" is not, in our opinion, inconsistent with the general purpose of the contract, nor antagonistic to the intent of the parties as gathered from the contract of guaranty in its entirety. To provide security for the payment of the rent reserved to the extent of three thousand six hundred dollars was the obvious purpose of the contract of guaranty and the apparent intent of the parties. The clause of the contract referred to, and which counsel for plaintiffs would have us reject, is in general accord with the purpose of the contract, and is not necessarily opposed to the main intent of the parties as gathered from the contract of

guaranty considered as a whole. The original guaranty contracts to indemnify the plaintiffs for a breach of the covenant of the lease to pay the rent reserved "in the sum of thirty-six hundred dollars (\$3,600)," and that sum is the aggregate of six months' rent at six hundred dollars per month.

There is, therefore, no good reason for rejecting that clause of the contract which purports to limit the liability of the corporation defendant to defaults in the payment of rent which might occur during the first five years of the life of the lease. Retaining this clause the trial court's construction of the contract does not involve an absurdity. It reconciles, in subordination to the main intent of the parties, the repugnancy, if any, existing between the terms of the original guaranty and the resolution; it is reasonably practicable and gives effect to every part of the contract. Such construction, therefore, must be sustained. (Civ. Code, secs. 1638, 1650, 1652.)

Whatever the uncertainty existing between the original guaranty and the resolution, it is readily removed by a resort to the statutory rules of construction, and therefore the rule that any uncertainty existing in the language of a contract must be "interpreted against the party who caused the uncertainty to exist" cannot be invoked in aid of plaintiffs' construction of the contract of guaranty. (Civ. Code, sec. 1654.)

The error, if any, in the ruling of the trial court sustaining an objection to a question propounded to a witness by plaintiffs' counsel, calling for the circumstances attending the execution of the guaranty, was harmless, for the reason that subsequently all of the circumstances preceding and attending the execution and delivery of the lease, the original guaranty, and the resolution were admitted in evidence without objection.

The judgment and the order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

[Crim. No. 623. First Appellate Court.—April 24, 1916.]

**THE PEOPLE, Respondent, v. JOHN W. McINERNEY,  
Appellant.**

**CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT ROBBERY—PLEADING AND PROOF.**—Although the prosecution alleges in the information that an assault with intent to commit robbery was committed with a deadly weapon, to wit, a loaded revolver, it is not limited to the proof of that particular form and means of assault, and where the evidence is otherwise sufficient to justify a conviction, the fact that it was not proven that the assault was made with a deadly weapon, to wit, a loaded revolver, does not render the verdict unsupported by the evidence, as the words "with a deadly weapon, to wit, a loaded revolver" may be treated as surplusage.

**ID.—INSTRUCTIONS—PROPER REFUSAL.**—In such a case there is no error in refusing instructions asked by the defendant touching alleged defect in proof as to the use of the particular weapon at the time of the assault; nor of instructions which were substantially covered by others given.

**ID.—INSUFFICIENT RECORD ON APPEAL.**—Where there is no affirmative showing as to whether or not certain instructions were in fact given, the appellate court must resolve the uncertainty of the record in favor of supporting the judgment.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Benjamin L. McKinley, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan,  
Deputy Attorney-General, for Respondent.

**THE COURT.**—The appellant was convicted upon the charge of assault with intent to commit robbery, and appeals from the judgment and order denying his motion for a new trial.

The charging part of the information was as follows: "Assault with intent to commit robbery, committed as follows: The said John W. McInerney on the 10th day of May, A. D. 1915, at the said city and county of San Francisco,

State of California, did then and there willfully, unlawfully, feloniously and with force and violence and with a deadly weapon, to wit: a loaded revolver, make an assault in and upon the person of one Frank G. Beutler with the felonious intent then, there and thereby, by force, violence and intimidation, to seize, steal, take and carry away the money, goods and chattels of the said Frank G. Beutler from the person and immediate presence and against the will of the said Frank G. Beutler." Upon the trial the evidence, while otherwise sufficient to justify a conviction, was insufficient to show that the defendant made the assault in question "with a deadly weapon, to wit, a loaded revolver"; and the appellant here contends that his conviction cannot therefore be sustained, for the reason that the prosecution having alleged in its information that the assault in question was made "with a deadly weapon, to wit, a loaded revolver," it was limited to the proof of that particular form and means of assault.

We cannot agree with this contention. The information was entirely sufficient to satisfy the requirement of the statute as to the charge of assault with intent to commit robbery without the inclusion in it of any language descriptive of the means by which the party assaulted was put in fear, or of the form of force and violence used to produce that condition. The words in the information "with a deadly weapon, to wit, a loaded revolver," were therefore surplusage which might have been omitted entirely from it without affecting its sufficiency in any way. This being so, we understand the rule of law to be that when such matter may be omitted entirely without affecting the charge against the defendant it may be considered as surplusage and disregarded, especially where the particular allegation was, as in this case, pleaded under a *videlicet* (22 Cyc. 448, and cases cited).

As to the appellant's contention that the court refused to give certain instructions asked by the defendant, it may be said that as to those instructions requested by him touching the foregoing alleged defect in proof as to his use of a particular weapon at the time of the assault, such instructions were properly refused; and as to the other instructions which the defendant requested and which were not given, we find that with one exception they are substantially covered by other instructions which the court gave. The exception has reference to an instruction asked by the defendant as to the

right of the jury to base a reasonable doubt upon the defendant's proof of good reputation. The record shows that the instruction is marked as "given" by the trial judge; but it is not included in the clerk's transcript purporting to set forth the full charge. There is no affirmative showing, however, as to whether or not the instruction was in fact given, and this being so, we must resolve the uncertainty of the record in favor of supporting the judgment.

Judgment and order affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 22, 1916.

[Crim. No. 619. First Appellate District.—April 24, 1916.]

**THE PEOPLE, Respondent, v. WILLIAM L. CHERRY,  
Appellant.**

**CRIMINAL LAW—ROBBERY—ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO ARREST OF DEFENDANT'S WIFE—WHEN NOT PREJUDICIAL.—**

In a prosecution for robbery, it is not prejudicial misconduct on the part of the district attorney in argument to call attention to the interest of defendant's wife, and to the fact that she is under arrest and out on bail, where it is conceded that the jury must have known that she was jointly charged with the defendant in the crime, and the evidence shows that she was a party thereto.

**Id.—ALLEGED MISCONDUCT OF COURT—WHEN NOT SHOWN.—**In a prosecution for robbery, where the jury after retiring, failed to agree, and on being called before the court attempted to learn how the court would regard a recommendation for probation, intimating that a verdict could be reached if such recommendation should be acted upon favorably, but the court stated that, while it would be glad of any recommendation, it would not promise to follow it, and that it was the duty of the jury, irrespective of what punishment would follow, to find its verdict from the law as given by the court and applied to the facts, and the jury thereafter rendered a verdict of guilty with a recommendation for probation, it cannot be contended that the court coerced the jury into finding a verdict of guilty; nor can such contention be made upon the ground that the court, in urging the jury to reach a verdict,



referred to the time consumed in the trial and the large expense incurred therein, the court saying nothing to indicate what the verdict should be.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. **Frank B. Ogden, Judge.**

The facts are stated in the opinion of the court.

**B. J. Wyman, Geo. J. McDonough, Rose & Silverstein, and A. C. Cunha, for Appellant.**

**U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.**

**THE COURT.**—The defendant in the court below and appellant herein was tried and convicted on a charge of robbery. On the twenty-ninth day of June, 1915, the prosecuting witness, Herman Hirsch, met Mrs. Hazel Cherry, the wife of the appellant herein, in the city of Oakland, who invited him to visit her home. A few days thereafter the defendant did so, and, after being there a short time, was induced by Mrs. Cherry to enter her bedroom. Mrs. Cherry seated herself upon the bed, and upon her invitation Hirsch did likewise, when almost immediately the defendant rushed in, revolver in hand, and after threatening to send Hirsch "over the road for ten years," took from him a watch and one hundred dollars. The defendant, however, almost immediately returned the watch, and then ordered Hirsch to leave the house.

At the trial the defendant's wife was a witness in his behalf, and, upon the argument of the cause to the jury, the district attorney during the course of his remarks, said: "Take into consideration the interest which the defendant's wife has in this case, keeping in mind all the time that she is under arrest at the present time and out on bail." Counsel for the defendant concedes that the jury must have known that the defendant's wife was jointly charged with him in the crime for which the defendant was on trial; the evidence in the record shows that she was a party thereto; and while it may not show that she was at the time of the trial under arrest and out on bail, still we are unable to perceive how the comment of the prosecuting officer could have prejudicially affected the rights of the defendant.

One of the contentions of the appellant is that the trial judge coerced the jury into finding a verdict. This point has no more merit than the one just discussed. After the jury had been deliberating upon their verdict during several hours, the judge caused them to be brought into court, and upon inquiry learned how they stood numerically, and that in the opinion of some members of the jury no verdict in all probability would be reached. Before again retiring, the foreman of the jury apparently attempted to learn how the court would regard a recommendation for probation, intimating that if the jury were satisfied that the court would be governed by such a recommendation a verdict in all probability would be quickly reached, whereupon the court stated: "All you have to do is to find a verdict; you take the law as given you by the court, and apply the facts of the case to the law; and after you have reached a conclusion, while the court would be glad of any recommendation which you have to make, the court could not promise you that it would follow your recommendation. . . . If you have arrived at a conclusion as to the facts, it is your duty, irrespective of what punishment would follow, to find the facts and report them to the court." Ultimately the jury brought in a verdict of guilty of robbery, requesting the court to place the defendant on probation. Upon the reading of the verdict and recommendation, the court provoked a colloquy, during which for a time it looked very much as if some of the jurors would say that they had voted for a verdict of guilty, believing and understanding that the court would be bound by their recommendation as to probation; but nothing the court had said justified any such understanding; and before finally dismissing the jury he took pains to learn that they understood and intended that the recommendation attached to their verdict carried no binding force on the court.

In this same connection, viz., the appellant's contention that the jury were coerced into their verdict, it is true that the court did, in urging the jury to reach a verdict, refer to the time consumed in the trial and the large expense incurred therein; but there is nothing in the record which warrants the assertion that the jury were unduly urged or at all coerced into rendering their verdict against the defendant. The court said nothing to indicate what the verdict should be. Its remarks were fair and guarded, and were made for the

commendable purpose of having the jury labor honestly and faithfully to arrive at a verdict if possible, and thus terminate the litigation. This did not constitute error.

The judgment and order denying defendant's motion for a new trial are affirmed.

---

[Crim. No. 612. First Appellate District.—April 24, 1916.]

THE PEOPLE, Respondent, v. NORMAN H. MATSON,  
Appellant.

CRIMINAL LAW—LIBEL—CONFLICTING EVIDENCE—VERDICT CONCLUSIVE—

In a prosecution for libel, where there is a substantial conflict in the evidence upon the matters constituting the libel, the verdict of the jury will not be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Contra Costa County, and from an order denying motion in arrest of judgment and motion for a new trial. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

Nathan C. Coghlan, and Edwin V. McKenzie, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—Appeal from judgment of conviction of libel, and from orders denying motion in arrest of judgment and motion for a new trial.

The libel for which the defendant in this case was convicted consisted practically of three separate statements contained in an article published in a newspaper, the first of which charged specifically and positively that one James P. Arnold, the prosecuting witness—and who was the chief of police of the city of Richmond—had been receiving ten dollars per week from one Jean Martin, a prostitute; the second was to the effect that Jean Martin had said that she had paid ten dollars a week to Arnold for police protection; and the third was that said Arnold had attempted to sell to Jean Martin

for the sum of ten thousand dollars a lot in the city of Richmond which was of the value of seven hundred dollars only, and also that he had been in the habit of visiting gambling houses.

We are satisfied that there is a substantial conflict in the evidence concerning what Jean Martin may have said in regard to the payment of ten dollars a week to Arnold; and we are also satisfied that there is evidence in the record sustaining the finding of the jury implied from their verdict that Jean Martin did not pay ten dollars a week to Arnold. True, that finding is based on the testimony of Arnold and of Jean Martin; but it is testimony standing in the record which the jury was entitled to believe if they saw fit under the instructions of the court; and if they believed it it is sufficient to support the verdict.

The conflict in the evidence on the other phase of the case practically takes the matter out of the hands of this court, because in the presence of such conflict we will not interfere with the conclusion reached by the jury.

With reference to the alleged misconduct of the district attorney, while the district attorney should not have made the argument as contained in the record, nevertheless we are not satisfied that it was of such a grievous character as to influence the verdict, or that it contributed in any material degree thereto.

No error appearing in the record, the judgment and order appealed from are affirmed.

---

[Civ. No. 1819. First Appellate District.—April 25, 1916.]

**ROSE J. McPHERSON, Respondent, v. EBERHARD TANNING COMPANY, Appellant.**

**CONTRACT OF PURCHASE OF LAND—EXERCISE OF OPTION—TENDER—INTEREST—SUFFICIENCY OF EVIDENCE.**—It is held in this action that the evidence was sufficient to sustain the findings of the trial court with respect to the exercise of an option to purchase land, and also that the interest should be computed up to the time of the tender only.

80 Cal. App.—19



APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

S. G. Tompkins, for Appellant.

H. C. Jones, and W. F. James, for Respondent.

THE COURT.—The court is of the opinion that the evidence sustains the finding of the trial court with respect to the exercise of the option to purchase the land; and the court is also of the opinion that the finding of the trial court that the interest should be computed up to the time of the tender only is justified and sustained by the evidence. It is conceded by counsel for the respondent that the judgment should be modified so as to provide for a personal judgment against J. C. McPherson for the sum of \$805, with interest up to the time of the tender.

The judgment is therefore modified so as to provide for a personal judgment against said J. C. McPherson for the sum of \$805, with interest up to the time of the tender, and the trial court is hereby directed to so modify the same; in all other respects the judgment is affirmed, the appellant to recover its costs of this appeal.

---

[Civ. No. 1828. First Appellate District.—April 26, 1916.]

ROY AKERS, Appellant, v. CARL RAPPE, Respondent.

CONTRACT—SALE OF JEWELRY BUSINESS—AGREEMENT NOT TO ENGAGE IN SIMILAR BUSINESS—EVIDENCE—BREACH OF CONTRACT.—A contract in which it was agreed that the seller of a jewelry business would not engage in the same business in the city in which such business was being conducted, for the period of twenty years, either for himself or as the employee of another, and that if he did so he would respond in liquidated damages in a specified sum, is violated by the opening of another jewelry store in the same city under the name and sign of the son of the seller in the building owned by the latter, who personally superintended the fitting

up of the store, furnished all money for the purchase of the stock, and for a considerable period of time after the opening of the store did all of the finer and more extensive repair work in the store premises and collected and receipted for the money paid for such work.

**1D.—CONTRACT NOT TO ENGAGE IN BUSINESS FOR TWENTY YEARS—TIME NOT UNREASONABLE.**—A contract not to engage in the same business for the period of twenty years in the city in which a business sold was conducted is not void on the ground that the time is unreasonably long, where the successors in interest of the buyer, after the lapse of six years of the time, are still conducting the original business.

**APPEAL** from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Wyckoff & Gardner, for Appellant.

George P. Burke, for Respondent.

**THE COURT.**—This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of three thousand dollars as stipulated damages upon a contract between the defendant and the predecessors in business of the plaintiff made in partial restraint of trade.

The facts of the case are substantially these: Carl Rappe, the defendant in this action, for many years conducted in the city of Watsonville a jewelry store known as Rappe's Jewelry Store. After building up the business he sold his store and the goodwill of the establishment in the year 1905 to a certain firm, and in connection with the sale entered into a written contract agreeing that he would not engage in the same business in the city of Watsonville for the period of twenty years, either for himself or as the employee of another, and that if he did so he would respond in liquidated damages to the extent of three thousand dollars. The purchasers took possession of the store, and after conducting its business for a time the firm dissolved, and one of its members became the owner of the establishment. Later on he sold to the plaintiff herein, transferring by the sale the goodwill of the business, and some time later indorsing and transferring the particular



contract in restraint of Rappe's right to conduct a like business in that town. The plaintiff thereafter continued to conduct the jewelry business at its established place. In the month of April, 1912, another jewelry store was opened in Watsonville under the name and sign of "Herbert Rappe, jeweler." Herbert Rappe was the son of the defendant Carl Rappe; and it is the said defendant's connection with the opening and conduct of said store which constitutes the gravamen of the plaintiff's claim in this action.

The evidence educed at the trial shows the following facts with reference to the defendant's connection, activities, and interest in the establishment and conduct of said store, which facts are in the main extracted from the statements of the defendant and his son Herbert Rappe while upon the witness-stand, and which are in the record substantially without contradiction. These facts are that the defendant owned the building in which the said jewelry store was opened and conducted under the name of his son; the defendant personally superintended the fitting up of the store; the defendant furnished all the money for the purchase of the stock of goods and personally selected and purchased the stock; the defendant advanced such additional moneys as were needed from time to time in the conduct of the business. The defendant's son kept no bank account, and the defendant gave his son checks on his own bank account from time to time to pay the bills of the store. The defendant consulted with his son and advised him as to the purchase of goods. At the time of the opening of the store the son of the defendant was not a jeweler and had no experience or expertness in the conduct of such an establishment. At the time the store was opened an announcement card was prepared, printed, and generally circulated in the community announcing the opening of "Rappe's Jewelry Store," and signed "Rappe the Jeweler." The defendant knew of the preparation and contents and circulation of said circular, and consulted and advised with his son as to the list of people to whom it should be sent. When the business was opened the defendant was the only watch-maker or jeweler connected with it or employed in the store. For a considerable period after the store was opened the defendant openly worked in the store at a bench in the front of the store and facing the show-window, where he would be conspicuous to passers-by and customers. During a consider-

able period following the opening of the store the defendant did all of the finer and more expensive repair work done in the establishment while sitting at this bench in view of passers-by, and collected and receipted for the money paid for such work, and in fact during the first year the store was opened made fully two-thirds of the sales and collections, and spent the larger portion of his time during business hours behind the counter or at work at his bench in the store.

From these practically undisputed facts this court is compelled to the conclusion that the evidence establishes without substantial contradiction that the defendant, by his foregoing acts and conduct in connection with the establishment of another jewelry store under the name of his son, violated the spirit and letter of his contract made with the predecessors of the plaintiff and to which the latter succeeded both by the purchase of the goodwill of the former business, and by the assignment to him of said contract, and that the defendant has thus rendered himself liable to pay the stipulated damages provided in said contract.

The respondent urges in support of the judgment of the trial court that there is a sufficiently substantial conflict in the evidence to sustain such judgment; but upon an examination of the entire record we are satisfied that whatever conflict there may be in minor portions of the evidence deduced at the trial, the essential facts above set forth are practically undisputed, and that this being so there is no such substantial conflict as would justify this court in sustaining the judgment.

The respondent further contends that the contract in partial restraint of trade upon which this action was predicated is void for the reason that it provides for an unreasonable length of time during which the defendant must refrain from engaging in business. We cannot agree with this contention. Section 1674 of the Civil Code provides that "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or a portion thereof as long as the buyer or any person deriving title to the goodwill from him carries on a like business therein." The evidence shows that the plaintiff is still engaged in conducting the original business under a title thereto and to the goodwill thereof derived from the persons to whom the defendant sold the same, and with whom such contract was made, and that about six years intervened be-



tween the time of such original sale and the time of the opening of the second store. We think that these facts bring the case clearly within the provisions of the above section of the code, and also within the line of cases holding similar contracts to be valid. (*Brown v. Kling*, 101 Cal. 295, 299, [35 Pac. 995]; *City Carpet etc. Works v. Jones*, 102 Cal. 506, [36 Pac. 841]; *Ragsdale v. Nagle*, 106 Cal. 332, [39 Pac. 628]; *Shafer v. Sloan*, 3 Cal. App. 337, [85 Pac. 162].)

For the foregoing reasons the judgment is reversed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 22, 1916.

---

[Civ. No. 1833. First Appellate District.—April 27, 1916.]

ROBERT J. RILEY, Appellant, v. EVENING POST PUBLISHING COMPANY (a Corporation), Respondent.

**LIBEL—PUBLICATION CONCERNING DIVORCE ACTION—ACCUSATION OF "AFFINITY"—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in an action for libel based upon the publication of an article in a newspaper having reference to a divorce action, which alleges that it was stated in such article that the husband in his complaint in such action accused his wife of having two affinities, of which the plaintiff was one, and which statement is alleged to be false, states a cause of action, and is not a fair and true report, without malice, of a judicial proceeding.

**Id.—PLEA OF PRIVILEGE—DEMURRER.**—In actions for libel the plea of privilege is defensive matter which cannot be raised on demurrer unless the complaint affirmatively shows that the report complained of as libelous is a fair and true report, without malice, of a judicial proceeding.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Milton A. Nathan, for Appellant.

C. H. Wilson, for Respondent.

**THE COURT.**—This is an appeal from a judgment in favor of the defendant in an action for libel rendered upon the order of the court sustaining a demurrer to the plaintiff's second amended complaint, the plaintiff having declined to further amend his pleading.

The plaintiff's said complaint alleges that the defendant, a corporation, is the owner and publisher of a certain newspaper of general circulation known as "The San Francisco Post"; that on or about the twenty-eighth day of April, 1913, one Patrick Farrelly commenced an action for divorce against his wife, Flora Farrelly, in the superior court of the city and county of San Francisco, and on June 19, 1913, filed an amended complaint therein, to which on August 19, 1913, his said wife filed an answer and cross-complaint; that on August 20, 1913, the defendant caused to be published in said newspaper an article having reference to said divorce action, which article is set forth in full in said complaint, and wherein, under sensational headlines, it is stated that Patrick Farrelly in his complaint in said divorce action accuses his wife of having two "affinities," of whom this plaintiff is named as one, who visited his home in his absence; it is also stated that the wife charges in her pleadings that her relations with Riley (the plaintiff herein) were not without the knowledge of her husband. The complaint in this action further alleges that said publication was false, libelous, malicious and defamatory, and also avers that the term "affinity," as used in said article and applied to the plaintiff therein, has a definite, provincial, and local meaning, viz., that it designates a person who bears an illicit sexual relation to another person of the opposite sex; and that said defendant in said publication used said word in that sense, and intended thereby to publish and assert that said Patrick Farrelly accused the said plaintiff of having illicit sexual relations with his wife, and that the same was in fact so understood by the readers of said article.

It seems perfectly plain to this court that a complaint couched in the foregoing terms states a cause of action for libel; and that it does not appear upon the face thereof that the article published by the defendant in said newspaper was "a fair and true report, without malice, of a judicial proceeding," and was for that reason a privileged publication. On the contrary, it clearly appears that said publication, in so far as it states that Patrick Farrelly in said divorce action accuses

this plaintiff of having sexual relations with Farrelly's wife, is false, libelous, malicious, and defamatory. In actions for libel the plea of privilege is defensive matter, which cannot be raised on demurrer unless the complaint affirmatively shows that the report complained of as libelous is a fair and true report, without malice, of a judicial proceeding; and, as we have seen, the exact opposite appears upon the face of this complaint.

It follows that the judgment must be reversed with instructions to the trial court to overrule the defendant's demurrer to the second amended complaint, and it is so ordered.

A petition for a rehearing of this cause was denied by the district court of appeal on May 27, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1916.

---

[Civ. No. 1640. First Appellate District.—April 27, 1916.]

**ALBERT ANDERSON, Respondent, v. MONTICELLO STEAMSHIP COMPANY (a Corporation), Appellant.**

**NEGLIGENCE—INJURY TO SAILOR FROM DANGEROUS HEAVING LINE—LIABILITY OF OWNER OF VESSEL.**—The owner of a vessel is liable in damages for personal injuries received by a sailor employed on the vessel from being struck by the sharp point of a steel spike in the end of a heaving line which was thrown ashore to him for the purpose of mooring the vessel, where it is shown that such line was not made up according to custom by the members of the crew from larger coils of rope supplied to them for that purpose, but was one furnished by the owner to the plaintiff and his fellow-employees at the time they entered its service.

**Id.—MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCES.**—It is the duty of the employer to furnish reasonably safe and suitable appliances for the use of his employees in the particular service in which they are engaged, and to keep such appliances in a reasonable state of repair.

**Id.—DANGER OF EMPLOYMENT NOT ASSUMED.**—In an action to recover damages for such injuries it cannot be contended that the plaintiff assumed the risk incident to the appliance, where it is shown that the nature of its defect and danger of its use were not obvious, and that

the plaintiff had never in fact been called upon to perform the particular duty which either required the use by himself, or exposed him to the danger incident to the use by others, of the heaving line.

**ID.—DISCOVERY OF DEFECTS—STATUS OF SERVANT.**—A servant is not required to use any degree of care or diligence to discover defects in an apparatus which are not obvious, and he will be held to have assumed the risk only where he knew, and will be held to have known only when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which was gross negligence for him to neglect.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. **W. M. Conley**, Judge presiding.

The facts are stated in the opinion of the court.

**Raymond Benjamin**, and **Stanley Moore**, for Appellant.

**H. W. Hutton**, for Respondent.

**RICHARDS, J.**—This is an appeal from a judgment and order denying a new trial.

The plaintiff was a sailor employed on a vessel of the defendant named "Arrow," carrying freight and passengers between San Francisco and Vallejo. The plaintiff entered upon this employment on February 5, 1911. On the night of March 12, 1911, he was sent ashore at Vallejo for the purpose of catching a heaving line to be thrown to him from the vessel, and which was attached to the hawser with which it was about to be moored at the defendant's wharf. The end of the heaving line which was to be cast ashore had in it an iron or steel spike about a quarter of an inch in diameter and about six inches long, around which the rope was wound and knotted in such a manner as to leave a small portion of the sharp end of the spike exposed. When the plaintiff had gone ashore and had signified to one of his fellow-employees on the vessel as to about where he was the line was thrown in his direction, when the end of it in which was this spike struck the plaintiff, the sharp point of the spike penetrating one of his eyes and destroying the sight thereof. The evidence in the case disclosed that this particular heaving line was a part of the equipment of the vessel at the time the defendant's em-

ployment began, but that he had never seen or used it before, this being the first time he had been called upon to perform the particular duty in the course of which he was injured.

The plaintiff recovered judgment for the sum of \$1,621 and his costs, and from such judgment, and the order denying a new trial, the defendant prosecutes this appeal.

The evidence in the case discloses that it was the custom of the defendant from time to time to have its heaving lines made up as needed, the work of preparing them for use being done by the sailors under the direction of the master. The evidence also sufficiently discloses, and the court found, that the heaving line with which the plaintiff was struck and injured was not a reasonably safe or suitable appliance for the purpose for which it was used; that while the ends of heaving lines which are to be thrown ashore in the direction where the sailor who is to catch or lay hold of them is supposed to be standing, have their heaving end sometimes weighted with bags of sand or knots made out of their own material, or even with pieces of lead completely inclosed within the folds of such knots, such lines so prepared are reasonably harmless, while the particular line used on this occasion, and having in its heaving end the exposed sharp point of an iron or steel spike, was unusual and dangerous to any person liable to be struck by it in the course of heaving it ashore. The evidence also shows that heaving lines are a part of the appliances usually furnished by the owners of such vessels for the use of their employees, and that this particular heaving line was one of such appliances furnished by the defendant to the plaintiff and his fellow-employees at the time they entered its service.

It is no longer necessary to cite authorities to the proposition that it is the duty of the employer to furnish reasonably safe and suitable appliances for the use of his employees in the particular service in which they are engaged, and to keep such appliances in a reasonable state of repair. The first of these duties was not done by the defendant in the case at bar. Whatever may have been the custom of having its heaving lines made up from time to time by the members of the vessel's crew from larger coils of rope supplied them for that purpose, the defendant can derive no comfort from it in this case, since the undisputed evidence shows that this particular heaving line was not made up either by the plaintiff or by

any of his fellow-employees, but was furnished by the appellant to them at the time of their employment. Neither can it be contended that the plaintiff assumed the risk incident to this appliance, for two reasons: first, the nature of its defect and danger of its use were not obvious; second, the plaintiff had never in fact been called upon to perform the particular duty which either required the use by himself, or exposed him to the danger incident to the use by others, of this heaving line. The rule declared in the case of *Silveira v. Iversen*, 128 Cal. 187, [60 Pac. 687], is applicable to the facts of this case: "The employee is not required to use any degree of care or diligence to discover defects; he will be held to have assumed the risk only where he knew, and will be held to have known only when the defect was so obvious that he must have known or simply refused to open his eyes and see; or when he was put upon inquiry by some discovery or suggestion of danger which was gross negligence for him to neglect." And in the case of *Mages v. North Pacific Coast R. R. Co.*, 78 Cal. 430, 437, [12 Am. St. Rep. 69, 21 Pac. 114], the court says: "It has often been said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is no part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry because it is the master's duty so to inquire, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them."

The appellant undertakes to avoid the application of these principles to the case at bar by the contention that this heaving line was in the nature of a small appliance, such as the minor tools of an employment, about the condition of which from their familiar use the employee knows more than the employer; but the evidence does not sustain this view. There were several of these heaving lines upon the vessel, but they were in use only when making landings, and that often at night, as in the case at bar. Moreover, they performed an essential function in the operation of bringing a vessel to the dock, and in their way were as important an appliance as the hawser itself.

Considerable space is devoted in the briefs of respective counsel to the discussion of the duty of inspection resting upon the defendant in the case at bar; but we do not deem this subject germane to the question before us, for the reason that the nature of the appliance was such that its defect and danger were inherent in its construction, and were present at the time of the plaintiff's employment, and would not be increased or diminished by use; and while these might have been discovered by a proper inspection on the part of the defendant, its original negligence in supplying the defective and dangerous appliance would not be either added to or lessened by making or omitting an inspection.

The final contention of the appellant is that the plaintiff was guilty of contributory negligence at the time of the accident by coming out from behind a pier where he had been standing at the moment the heaving line was thrown. But upon this subject the evidence is conflicting, and the finding of the trial court will not for that reason be disturbed.

We are of the opinion also that the evidence as a whole is sufficient to sustain the findings and conclusions of the court, and we discover no error which would justify a reversal of the case.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

---

[Civ. No. 1667. First Appellate District.—April 27, 1916.]

**BANCA COMMERCIALE ITALIANA DI GENOVA** (a Corporation), Appellant, v. **P. SCHLEGEL AND COMPANY** (a Corporation), Respondent.

**ACTION UPON WRITTEN INSTRUMENT—PLEADING—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER.**—In an action between the original parties to a written instrument, the substance of which is pleaded, and from which it appears the defendant promised and agreed to pay the sum of money specified in the instrument, for value received, which upon proper demand it has failed and refused to do, the complaint is sufficient, as against a general demurrer, notwithstanding the writing may not have been such in form as to constitute a negotiable instrument.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. George E. Crothers, Judge.

The facts are stated in the opinion of the court.

Cushing & Cushing, and William S. McKnight, for Appellant.

F. H. Dam, for Respondent.

**LENNON, P. J.**—This action was commenced by plaintiff to recover from the defendant the amount of a foreign draft drawn in plaintiff's favor and accepted by the defendant. A demurrer to the original complaint was sustained, whereupon an amended complaint was filed setting out more fully the circumstances under which the draft was drawn, but to which a general demurrer was also sustained without leave to amend. The plaintiff prosecutes this appeal from the judgment thereupon entered in defendant's favor.

The amended complaint alleges that on February 13, 1913, Bonavera & Daffiene, a firm in Italy, executed and delivered to the plaintiff a written instrument negotiable in form and referred to in said pleading as a bill of exchange, whereby they ordered and directed defendant to pay within ninety days after sight to the plaintiff in San Francisco the sum of fcs. 3745.90 lawful money of the Republic of France in lawful money of the United States at the rate then existing in San Francisco for sight drafts on Paris; that a bill of lading for certain goods accompanied said draft, which was to be delivered to the defendant upon its presentation and payment; that thereafter on March 17, 1913, the plaintiff delivered said bill of lading to the defendant, who thereupon promised and agreed to pay said draft or bill of exchange, and as evidence thereof wrote upon the face of said document the words "Accepted March 17, 1913. P. Schlegel & Co."; that upon delivery to it of the said bill of lading the said defendant presented the same to the carrier having in charge the goods called for by its terms and of which the sum named in said draft was the purchase price, and received possession of the same, which were of the value of the sum specified in said draft; that on June 5, 1913, the said plaintiff presented

said bill of exchange to said defendant for payment, and demanded the said sum of fcs. 3745.90, which at the rate then existing in San Francisco for sight drafts on Paris was of the value of \$723.85, but which sum the defendant has refused and failed to pay. Wherefore the plaintiff prays judgment for said sum.

The demurrer to this complaint was general and was sustained by the trial court.

We think its ruling in that regard was error. This is an action between the original parties to a written instrument, the substance of which is pleaded, and from which it appears the defendant promised and agreed to pay the sum of money specified therein for value received, which upon proper demand it has failed and refused to do. Whether or not the writing was such in form, or in its certainties, as to constitute a negotiable instrument, is a question which does not arise on demurrer in an action between the original parties to it and which is not presented upon the record before us; it will not therefore be considered upon this appeal.

The objections which the respondent urges to the complaint otherwise all apparently go to matters of uncertainty which would not avail against the validity of a non-negotiable instrument, and which could only have been taken advantage of in this action by special demurrer.

The judgment is reversed, with instructions to the trial court to overrule the defendant's demurrer to the amended complaint.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1916.

[Civ. No. 1696. First Appellate District.—April 27, 1916.]

**CONSOLIDATED MUSIC COMPANY (a Corporation),  
Respondent, v. JOSEPHINE MORRISON, Appellant.**

**CLAIM AND DELIVERY—PLEADING—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER.**—In an action to recover the possession of a certain musical instrument in the possession of the defendant under a contract of conditional sale, the complaint is sufficient as against a general demurrer or a motion for judgment upon the pleadings, made upon the ground that the complaint does not state facts sufficient to constitute a cause of action, where the plaintiff's ownership and right to possession of the property is alleged, notwithstanding that there is no averment of default or breach of contract on the part of the defendant.

**ID.—PLEADING—UNVERIFIED ANSWER TO VERIFIED COMPLAINT—EFFECT OF.**—An unverified answer to a verified complaint may be treated as sham and disregarded on a motion for judgment on the pleadings.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Thos. F. Graham, Judge.

The facts are stated in the opinion of the court.

James E. Colston, for Appellant.

Henry G. W. Dinkelspiel, and John B. Jones, for Respondent.

**THE COURT.**—This is an appeal from a judgment rendered and entered in favor of the plaintiff upon motion for judgment on the pleadings. The action was upon claim and delivery for the recovery of the possession of a certain musical instrument. The complaint was verified, and alleged that the defendant was in possession of such instrument under a contract of conditional sale; that the contract required installments to be paid thereon at certain specified times, and reserved title in the plaintiff until the purchase price thereof had thus been fully paid. The agreement is attached to the complaint. It is not specifically averred that the defendant is in default in making these payments, but the complaint does allege that the plaintiff is the owner and is entitled to the immediate possession of the property, and that the defend-

ant without any excuse or justification withholds from the plaintiff the possession of the same after demand duly made.

To this verified complaint the defendant first filed a general unverified denial, and thereafter filed a specific and also unverified answer, denying the material averments of the complaint. The plaintiff thereupon moved for judgment on the pleadings upon the ground that the defendant's answer was sham, frivolous, and insufficient to constitute a defense to the action. The defendant responded to this motion with a counter-motion for judgment in her favor upon the pleadings upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The court denied the defendant's motion, and granted the motion of the plaintiff, and thereupon gave judgment in its favor, from which judgment the defendant appeals.

We are of the opinion that the complaint was sufficient as against a general demurrer or as against the defendant's motion for judgment on the general ground that it failed to state a cause of action. It is true that said complaint did not specifically aver a breach of her contract on the part of the defendant; but it did contain express averments of plaintiff's ownership and right to the possession of the property. This form of allegation was expressly approved in actions on claim and delivery in the case of *Summerville v. Stockton Milling Co.*, 142 Cal. 529-547, [76 Pac. 243]. At most it may be said that the complaint was uncertain; and this objection could not be urged under the general ground of objection. The defendant's motion for judgment on the pleadings was therefore properly denied.

The defendant's answer to the plaintiff's verified complaint was unverified, and the court was for that reason entitled to disregard and treat it as sham upon the plaintiff's motion for judgment on the pleadings. This it did; and in so doing committed no error, either in its order granting such motion, or in its judgment based upon a complaint which, as we have seen, stated facts sufficient as against a general demurrer to constitute a cause of action.

**Judgment affirmed.**

[Civ. No. 1836. First Appellate District.—April 27, 1916.]

**ARTHUR STRAUSS, Respondent, v. GEORGE B. MOWBY,  
Appellant.**

**MOTION FOR CHANGE OF PLACE OF TRIAL—SUFFICIENCY OF AFFIDAVITS.—**

It is held that the affidavit of the plaintiff on a motion for a change of place of trial in this action is positive in character, and was sufficient to raise a substantial conflict on the question of defendant's residence, for which reason the conclusion of the trial court will not be disturbed on appeal.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco denying a motion for a change of place of trial. George E. Crothers, Judge.

The facts are stated in the opinion of the court.

J. K. Johnson, for Appellant.

Isaac Frohman, for Respondent.

**THE COURT.**—This is an appeal by defendant from an order denying his motion for a change of the place of trial. The only question raised on the appeal is the sufficiency of the affidavit of the plaintiff touching the place of residence of the defendant, it being the contention of the appellant that the statements contained in said affidavit are based merely on hearsay, and consequently raised no conflict with the statements contained in the affidavit of the defendant. It is quite plain, however, from a perusal of the plaintiff's affidavit that the statements referred to are positive in character, and not subject to the criticism of the appellant in the respect mentioned. They were sufficient to raise a substantial conflict on the question of the defendant's residence, in view of which the conclusion of the trial court will not be disturbed upon appeal.

The order is affirmed.

30 Cal. App.—20

[Civ. No. 1708. First Appellate District.—April 27, 1916.]

**J. M. MORROW et al., Respondents, v. GEORGE E. WELLS,**  
Appellant.

**VENDOR AND PURCHASER—INSTALLMENT PAYMENTS—SECURITY OF PAYMENTS BY CROP MORTGAGE—APPLICATION OF PROCEEDS.**—Where a contract to purchase land provides that the price shall be paid in specific amounts at specified times, the vendor is not warranted under the terms of a crop mortgage given by the vendees to secure the payments of such amounts, in applying the proceeds of the whole crop on such price, where it is shown that both instruments were made at the same time, but is limited in making such application by the terms of the contract.

**APPEAL** from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, and Shepard & Shepard, for Appellants.

Everts & Ewing, and Gallaher & Aten, for Respondents.

**LENNON, P. J.**—This action was brought to recover the sum of \$1,080, claimed to have been wrongfully withheld by defendant. Plaintiffs recovered judgment for the sum of \$859.69, and this appeal is from such judgment.

The controversy arose out of the sale of certain lands situated in the county of Fresno, the facts being substantially as follows: On the fourth day of March, 1912, the defendant, George E. Wells, entered into a written contract to sell to plaintiffs the land in question. At that time one C. B. Darneal, a son-in-law of the vendor Wells, was in possession of the premises under a certain lease, by the terms of which Darneal had agreed to properly farm, cultivate, care for, and market the crop of fruit growing thereon for the year 1912, and was to receive for his services one-half of the proceeds thereof, and the land was sold subject to such lease. Darneal harvested the fruit and some hay, sold the same, and accounted to Wells, but withheld from the plaintiffs their share, alleged to be the sum sued for. By the terms and conditions of the contract of sale the vendees of the land, plain-

tiffs herein, agreed to pay the sum of \$6,750 for the land with interest on deferred payments at the rate of seven and one-half per cent per annum. In substance the agreement provided for the payment of two hundred dollars cash in advance, balance of interest payable September 1, 1912. All interest thereafter was payable in advance on the first day of September of each year, \$250 on the principal September 1, 1913, and a like amount each year thereafter until a certain amount was paid, when a new arrangement or agreement was to be made. As part of the terms of the contract and as further security for the payments stipulated for, it was provided that plaintiffs should execute to the defendant Wells a mortgage on the crops raised on the premises, said mortgage to cover one-half of the crops for the year 1912, and to extend to all of the crops raised during certain succeeding years. In conformity with this clause of the contract a crop mortgage was executed by plaintiff in favor of defendant Wells. At or about the time specified for the first payment under the contract, on September 1, 1912, defendant Wells became dissatisfied with the contract, and the record shows that he endeavored to avoid carrying out its terms; in fact, it is fairly manifest that he concluded to treat the contract as at an end so far as he was concerned, and from that time on he managed the property as his own, confusing the crops with those raised on his home place. As further evidence of this fact he endeavored to evade a tender due from the purchasers, who thereupon deposited the same to his credit in the Union National Bank of Fresno. In addition to this it is in evidence that Wells expressly declared that he considered the contract at an end.

Defendant seeks to escape liability for the performance of the contract on the following grounds: (1) It is their claim that it was the duty of the plaintiffs to care for and protect the growing crops, and that they having neglected so to do, the defendant was compelled to install a pumping plant and to furnish trays and sweat-boxes, and market the products at his own expense; (2) Because of the fact that the mortgage was given to cover the whole balance of the purchase price due under the contract of sale, that the vendor was entitled to retain all the sums received from the sale of the fruit, and apply them on the contract.

With reference to the first contention it is sufficient to say that the trial court found upon conflicting evidence that no boxes or trays were ever furnished by defendant, and that no pumping plant was ever installed or was ever needed to protect the crops. This finding is amply supported by the evidence, and under the familiar rule cannot be disturbed on appeal.

Equally untenable is the second contention. In the very terms of the contract of sale the amount to become due thereunder was definitely provided for. The mere fact that the crop mortgage was given as security for the full amount due under the contract does not thereby qualify the express terms of the contract in this respect. These two instruments were made at the same time and depended upon each other, and were in effect one contract. From a reading of the two instruments it is clearly manifest that the intention of the parties was to have the profits of the land insure the payments due under the contract according to the terms provided for therein, and these payments were specific amounts at specified times.

No other questions are presented.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1916. Shaw, J., dissented from the order denying a hearing in the supreme court.

---

[Civ. No. 1712. First Appellate District.—April 27, 1916.]

A. C. CROSBY, Respondent, v. FRESNO FRUIT GROWERS' COMPANY (a Corporation), Appellant.

**MORTGAGE ON GROWING CROPS—DELIVERY TO PACKING ASSOCIATION—VIOLATION OF AGREEMENT—LIEN NOT LOST.**—The lien of a mortgage on a crop of grapes is not lost by the delivery of the crop to a packing house for marketing by the mortgagor in his own name in violation of an agreement between the mortgagor and mortgagee that the crop

should be delivered in the name of the mortgagee, as under such an agreement the mortgagor is constituted the agent of the mortgagee.

**ID.—REMOVAL OF CROP INDEPENDENT OF AGREEMENT—LIEN NOT LOST—STATUS OF CONSIGNEE OF MORTGAGOR.**—The lien of a mortgage on a growing crop is not lost by the wrongful removal of the crop from the land, independent of any agreement, and such lien still exists against the consignee of the mortgagor, unless he can clothe himself with the character of an innocent purchaser for value.

**ID.—RECOVERY OF PROCEEDS OF CROP—PLEADING—EXECUTION OF MORTGAGE—DENIAL UPON INFORMATION AND BELIEF.**—In an action by the mortgagee against the consignee of the mortgagor to recover the proceeds of such crop, a denial upon information and belief of the execution of the mortgage sufficiently raises the issue, notwithstanding the defendant had constructive notice of its recordation.

**APPEAL** from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.  
H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, for Appellant.

G. L. Aynesworth, for Respondent.

**KERRIGAN, J.**—On September 30, 1912, A. H. Weyant, according to the allegations of the complaint, was indebted to A. C. Crosby, the plaintiff, in the sum of one thousand dollars, evidenced by promissory notes secured by a mortgage on a certain crop of grapes in Fresno County, which mortgage was duly recorded. On the seventeenth day of April, 1913, Weyant entered into a consignment contract in writing, by the terms of which he "assigned, transferred, and agreed to deliver" to the defendant this crop of grapes. Under said contract the defendant was to pack and sell the grapes through the California Fruit Exchange, and after deducting certain enumerated expenses, and a commission of seven per cent on the gross sales, the proceeds were to be paid to Weyant. On June 26, 1913, Weyant assigned all his interest in the said contract to S. L. Weyant, his wife, receiving on account thereof two hundred dollars. Weyant at once gave defendant notice of the assignment to his wife, and the account concerning the grapes when later delivered was kept by the defendant in her name. Prior to the delivery of the grapes,

which was in August, and shortly after the assignment of Weyant's interest in the consignment contract to his wife, he, his wife, and Crosby had an oral understanding that in order to protect the Crosby mortgage the grapes should be shipped and delivered to the defendant in Crosby's name, and the proceeds from the sale thereof should be paid to Crosby and applied by him on account of the payment of the Crosby mortgage. In due time the crop of grapes was delivered by Weyant to the defendant, without, however, stating that he was delivering them for Crosby's account, and he left the defendant under the impression that the delivery was made under the terms of the existing contract of consignment and the assignment thereof to his wife.

The net proceeds due from the sale of the grapes by defendant were the sum of \$789.69, which plaintiff claims he is entitled to by virtue of the provisions of the crop mortgage and the delivery thereof to the defendant by Weyant as his agent. Defendant, on the other hand, claims that it is entitled to part of the proceeds of the sale of the grapes because of moneys paid to and on account of Weyant at the time of entering into the contract of consignment and subsequently, and which it was agreed between defendant and Weyant should be reimbursed to defendant out of the net proceeds of the sale of the grapes when consigned and sold, and as to the balance of the proceeds the defendant asserts that it held the same subject to certain attachment proceedings in actions pending against Weyant.

The court found in favor of the plaintiff as to the execution of the mortgage; that the defendant had notice of it, and that the delivery of the grapes to the defendant was for and on account of plaintiff, and rendered judgment in favor of plaintiff for \$789.69, the amount of the net returns on the crop of grapes. The defendant's motion for a new trial was denied, and this appeal is from the judgment and the order denying such motion.

The principal points made by the appellant for reversal are that under section 2972 of the Civil Code the plaintiff's mortgage lien on the crops was lost by the removal of the crop from the land, and that there was no proof made in the trial court of the execution or existence of the mortgage or of the amount, if any, due thereunder to the plaintiff.

Section 2972 of the Civil Code is in the following terms: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." The question has heretofore arisen whether the removal of the crop by the mortgagee is such a removal as will destroy the lien, and it has been held that it is not. The reason for the rule thus announced probably is that the mortgagee having taken possession of the crop for the purpose of enforcing his rights, is in the same position as the pledgee of personal property in possession of the pledge, and his lien on the property is of exactly the same quality and nature. In the case of *Campodonico v. Oregon Improvement Co.*, 87 Cal. 566, [25 Pac. 763], the question was whether or not there had been such a removal of the mortgaged property as to destroy the lien. There one Dodge had duly mortgaged growing beans and barley to the plaintiff to secure payment of a certain sum of money, which mortgage was recorded. Thereupon Dodge, at the request of plaintiff, the mortgagee, had the property hauled from the land on which it was grown and delivered to the defendant at its warehouse, instructing the person hauling it to store the property in the name of the plaintiff. The receipts for the property, however, notwithstanding the efforts of Dodge to have them issued in the name of the plaintiff, were issued in Dodge's name. The plaintiff did not know of this until October 28, 1888, when he was informed of that fact, and of the further fact that the property had been attached the day before. In upholding the judgment of the lower court in plaintiff's favor the court said: "The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. (*Byrnes v. Hatch*, 77 Cal. 241, 244, [19 Pac. 482].) The neglect or refusal of the defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien in favor of the assignee of the insolvent, Dodge."

In *Byrnes v. Hatch*, 77 Cal. 241, [19 Pac. 482], a crop of hay was hauled to a warehouse by the mortgagor at the request of and as the agent of the mortgagee, who had taken a chattel mortgage on the growing crop. In this situation the court said: "It seems that the lien of the mortgagee on the crop is not lost."

In the case at bar the agreement between the mortgagor and mortgagee that the former should deliver the crop to the defendant in the name of the mortgagee must, when the crop is removed under such agreement and the delivery made, be held to constitute the mortgagor the agent of the mortgagee in such delivery, even though such agent violates his instructions and delivers the crop in his own name. No question here arises of advances made by the consignee to the agent upon the security of the crop after its delivery, in which event other legal principles might find their just application, and estop the mortgagee from insisting upon his rights as against the consignee. Here the advances made by the consignee were made during the time that the crop was still upon the land, and when the consignee was charged with notice of the mortgagee's rights. The consignee will not be permitted to take advantage of the wrong committed by the mortgagee's agent from which it has not suffered.

In what we have said it is assumed that the removal of the crop from the land was under the agreement with the mortgagee, and that the only wrongful act of the mortgagor was in the violation of his further agreement with the mortgagee that the crop should be delivered to the defendant in the mortgagee's name. But, on the other hand, if Weyant in removing the crop from the land purported to do so on his own account, still the defendant is in no better case; for such removal was also wrongful and Weyant could not take advantage of his wrongful act, and his consignee, being a mere agent, is in the same position, unless he can clothe himself with the character of innocent purchaser for value. This, we have seen, the defendant has not done. In the cases of *Wilson v. Prouty*, 70 Cal. 197, [11 Pac. 608], and *Martin v. Thompson*, 63 Cal. 3, it was held that the tortious removal of the crop by a third person does not destroy the lien of an existing chattel mortgage thereon, and this principle is evidently applicable to a tortious removal by the mortgagor himself.

For the foregoing reasons we hold that under the facts found in this case the net proceeds of the sale of the crop are applicable to the payment of the debt due the mortgagee, and that if all these findings were supported by the evidence the conclusion of the court that the defendant dealt with the crop with notice of and in subordination to the plaintiff's mortgage would have been correct.

The next point made in support of the appeal is that there is no evidence in the record to sustain the finding of the court that Weyant was indebted to the plaintiff in the sum of one thousand dollars evidenced by a promissory note, and to secure payment of which he executed, acknowledged, and delivered to the plaintiff the mortgage in question, and that no payment had been made on account of such indebtedness.

The position of the respondent in answer to this contention is that the allegations of the complaint bearing upon these matters were denied only upon information and belief, and that such denials were insufficient to raise an issue thereon. The trial court apparently adopted this view. In this we think the court erred. While the defendant could not deny on information and belief the recordation of the mortgage, it could so deny its execution and the existence of the debt. The defendant was not a party to the mortgage; and while receiving constructive notice of its contents through its recordation, it was still entitled to put the plaintiff to proof of its due execution, and did so by a denial based on lack of information and belief—the only form of denial it was possible for it to make.

Speaking of the right of a defendant to deny an allegation upon information and belief, Mr. Bliss, in his work on Code Pleading, section 326, says: "The obligation to verify the pleading implies an obligation to state the truth; hence the permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's knowledge—as, an act done by himself and within the period of recollection, or where he has the means of information—a denial of information in the language of the statute would be clearly false or evasive, and such an answer should be disregarded."

Applying the principle as thus stated by Mr. Bliss to the present case, the fact charged, viz., the execution of the note and mortgage, was not within the defendant's knowledge; it

was not a party to it and had no means of information. An examination of the record would disclose nothing but the purported execution of the mortgage and the purported existence of an indebtedness secured thereby. In the case of *Humphreys v. McCall*, 9 Cal. 59, 62, [70 Am. Dec. 621], the rule is thus laid down: "When the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer upon information and belief, but must answer in the positive form. And where, from the nature of the fact alleged, the knowledge, if any, of the defendant, is presumptively based on information, he is not bound to deny positively, but only 'according to his information and belief.' In this case the transfer from Cooper was the act of a *third* party; and unless it has been expressly alleged in the complaint that defendants knew that fact of their own knowledge, they could only be required to answer according to their information and belief."

None of the cases cited by the respondent go to the extent claimed by him. In *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 429, 433, [114 Pac. 1028], the facts denied for want of information and belief were an adjudication in insolvency and the appointment of a receiver—a case in which the records themselves proved the existence of the facts alleged. And so in *Mendocino County v. Peters*, 2 Cal. App. 24, 28, [82 Pac. 1122], where the facts denied were public records, such as the report of the viewers in a condemnation proceeding for a public road, the notice of hearing and various orders of the board of supervisors. In *Mulcahy v. Buckley*, 100 Cal. 484, [35 Pac. 144], (which the respondent in his brief characterizes as his best case), it was the record of a claim of lien; and in *Hewel v. Hogan*, 3 Cal. App. 248, [84 Pac. 1002], the treasurer of an irrigation district, being sued for the payment of interest coupons on bonds issued by the district, denied on information and belief, the signature of the secretary of the district upon such coupons. Such a denial was in effect the denial by the district, through one of its officers, of the signature of its own secretary—clearly a fact which was presumptively within the knowledge of the treasurer of the district. Moreover, in this case the court found as a fact that the coupons bore the lithographic signature of the said secretary.

We think it plain that the defendant's denial in the case at bar, based upon lack of information and belief, raised an issue, and put the plaintiff to the proof of the note and mortgage and the indebtedness due thereon. There being no evidence introduced on these points the finding of the court is unsupported, and is therefore erroneous.

The judgment and order are reversed, and the cause remanded for a new trial.

Lennon, P. J., and Richards, J., concurred.

---

[Civ. No. 1823. First Appellate District.—April 27, 1916.]

**MARY LINNEWEBER et al., Appellants, v. SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA (a Corporation), Respondent.**

**FRATERNAL INSURANCE LAW—ACTION ON POLICY—STATUTE OF LIMITATIONS.**—Under the terms of a fraternal life insurance policy providing that whenever any competent court having jurisdiction at the last known domicile of an insured member shall render judgment to the effect that the member has not been seen or heard from during a period of seven consecutive years prior to the date of the judgment, the same shall be presumptive proof of his death, and his benefit certificate shall at once become due and payable as if he were really proven dead, the beneficiaries of the insured are entitled to await the termination of the seven-year period before commencing an action on the policy, and the statute of limitations does not run against such an action until the expiration of such period.

**ID.—PLEADING AND EVIDENCE—RIGHT TO MAINTAIN ACTION—CHILDREN OF DECEASED BENEFICIARY.**—Where a policy of insurance is made payable to a designated person or, in case of his death, to his children, and such person has died prior to the commencement of an action to recover on the policy, it is not necessary for them to either plead or prove that there had been a probate of their father's estate, but such issue should be tendered by the defendant.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.



F. W. von Schrader, and von Schrader & Cadwalader, for Appellants.

Walter Christie, and F. J. Kierce, for Respondent.

**THE COURT.**—This is an action brought to recover the sum of two thousand dollars alleged to be due to plaintiffs from the defendant upon a beneficial policy or certificate of insurance issued by the latter to one James Martin, and made payable to "Bernard Linneweber, or in case of his death to his children," as the beneficiaries thereof.

The facts of the case, out of which the defendant's liability is alleged to have arisen, are contained in an agreed statement of facts presented at the trial of the cause, and which is substantially as follows: The policy or certificate of membership of James Martin in the defendant association was issued in the year 1882, and he continued to be and was a member in good standing therein up to and upon April 18, 1906, the date of the earthquake and fire in the city and county of San Francisco. He was then seventy-five years of age, and was afflicted with a number of the disabilities which attend old age. He was seen immediately after the earthquake in front of the hotel in which he stayed and which was within the district presently swept by the fire. He disappeared, however, at the time of said fire, and has never been seen or heard of thereafter. In the month of December, 1906, he was suspended by the defendant association for nonpayment of dues. Thereafter, and in 1909, Bernard Linneweber, his immediate beneficiary, died. The plaintiffs herein are his only children. On April 22, 1913, this action was commenced to recover the amount of said policy.

The defendant demurred to the complaint upon the general ground and also upon several alleged grounds of uncertainty, which demurrer being overruled an answer was filed, putting in issue the material averments of the complaint, and also pleading the bar of the statute of limitations. Upon the trial the agreed statement of facts was presented from which the foregoing facts appear, and wherein are also set forth the following material parts of the policy or certificate of insurance upon which the respective parties rely to sustain or defeat this action:

Section 197: "Whenever any competent court having jurisdiction at the last known domicile of an insured member shall render judgment to the effect that the member has not been seen or heard from during a period of seven consecutive years prior to the date of the judgment, the same shall be presumptive proof of his death, and his Benefit Certificate shall at once become due and payable as if he were really proven dead. The judgment of court shall be furnished at cost of beneficiary."

Section 134: "No action at law or in equity at any court shall be brought or maintained on any cause or claim arising out of any membership or benefit certificate, unless such action is brought within three years from the time when such right of action accrues."

It is agreed that these two sections of the policy or certificate of insurance were in effect at the time of the disappearance of said James Martin. Subsequently, and in the year 1910, section 197 was amended to read as follows:

"In case a member of this order disappears from his home or state, there shall be no presumption of the death of such member. If, after seven years dating from such disappearance the beneficiary or beneficiaries shall establish the fact of death of such member in a court of record having common law jurisdiction, to which proceeding the Supreme Council Catholic Knights of America shall be a party, the benefit shall be paid."

Upon the trial and submission of the cause the trial court made its findings of fact embodying substantially the matters contained in the agreed statement of facts, but finding expressly therefrom that James Martin died on April 18, 1906, and also making the express finding that the cause of action was barred by the statute of limitations. Judgment was accordingly entered in favor of the defendant, and from such judgment and an order denying a motion for a new trial the plaintiffs prosecute this appeal.

We are of the opinion that the trial court was in error in its conclusion that this action was barred by the statute of limitations and in its judgment based thereon. Section 197 of the policy or certificate of insurance as it read on April 18, 1906, and not as it was amended to read in July, 1910, must be held to control the rights and liabilities of the respective parties. If it be a fact, as the court found, that James Mar-

tin died on April 18, 1906, the finding of the court that James Martin did die on that date is supported by the presumption of death, which by the terms of said section as well as by the general law arises when a period of seven years has elapsed after the disappearance of the person. By this presumption the fact of the death of said person is proven, but not the date of his death at any particular time during the seven-year period; but the court had before it certain other facts, such as the extreme age and bodily infirmities of the deceased, and also the fact of the peril in which he was when last seen. These would not have been sufficient to establish the fact of the death of James Martin so as to have enabled these plaintiffs to maintain this action during the seven-year period; but they would be sufficient to sustain the finding of the court fixing the date of the decedent's death after the presumption had sufficed to prove the fact of his death. Under these conditions the case of *Benjamin v. District Grand Lodge etc.*, 171 Cal. 260, [152 Pac. 731], has direct and controlling application to the case at bar. Under the authority of that case, as well as under the express terms of section 197 of the policy or certificate of insurance, these plaintiffs, if, as the beneficiaries of James Martin they were entitled to sue at all, were entitled to await the termination of the seven-year period which would give rise to the presumption of Martin's death before commencing their action; and this being so, the statute of limitations could not have operated as a bar to this action. It need hardly be suggested that if in fact, as the court found, James Martin died on April 18, 1906, he could not have been lawfully suspended from the association for nonpayment of dues at any time thereafter; nor would his beneficiaries have been bound to keep such dues paid in order to preserve their right to receive the benefit accruing by virtue of his membership in good standing at the time of his death upon proper proof of the fact and date of his decease.

It follows necessarily that the court was in error in its finding and judgment herein based upon the plea of the statute of limitations.

The respondent, however, contends that the plaintiffs herein cannot recover because they were not shown to have capacity to sue nor to be the proper parties plaintiff, for the reason that while it was conceded that they were the only children of their deceased father, Bernard Linneweber, the immediate

beneficiary of James Martin, it was not pleaded or proven that there had been any probate of their said father's estate. We think this issue should have been tendered by the defendant in some specific pleading, and that the objection comes too late upon this appeal. It is agreed that these plaintiffs are the only children of Bernard Linneweber, and hence the only surviving beneficiaries under the terms of the policy. It was not shown that there was any other estate or any creditors of Bernard Linneweber. At the time of his death James Martin was still presumed to be living, and hence no right of property or of action on this policy had accrued under its terms. It thus appearing that these plaintiffs are the real and, so far as the record discloses, the only parties in interest in this action, we think they were entitled to maintain it in the absence of affirmative pleading and proof on the part of the defendant to the contrary.

Judgment and order reversed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1916.

---

[Civ. No. 1719. First Appellate District.—April 27, 1916.]

**MARTIN L. GATES, Appellant, v. GERTRUDE JULIA CUNNINGHAM, Administratrix, etc., Respondent.**

**HUSBAND AND WIFE—BANK DEPOSITS—PRESUMPTION OF COMMUNITY PROPERTY OVERCOME.**—The presumption that money deposited by a wife in a savings bank during marriage is community property is overcome by evidence tending to show that the money was accumulated from the personal income of the wife's mother and brother, and that the wife merely handled it in her name as their agent or trustee.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Stafford & Stafford, and W. P. Caubu, for Appellant.

Martin Uldall, for Respondent.



LENNON, P. J.—This is an appeal from a judgment entered in favor of the defendant, and from an order denying the plaintiff a new trial, in an action wherein the plaintiff sought to recover the sum of one thousand nine hundred dollars upon a rejected claim against the estate of George W. Rapp, deceased. The plaintiff's cause of action was rested primarily upon allegations of fact substantially as follows:

Martin L. Gates and Julia Gates were husband and wife. During their married life they accumulated by their joint efforts the sum of one thousand nine hundred dollars, which was community property. This money was deposited by the wife in the Savings Union Bank and Trust Company in the city of San Francisco, with the knowledge, consent, and approval of her husband. A short time prior to her death, viz., on June 21, 1914, the wife, without the knowledge or consent of her husband, gave to George Rapp, the deceased, an order upon the Savings Union Bank and Trust Company for the one thousand nine hundred dollars which she had on deposit there. Rapp presented the order to the bank; it was honored and the money withdrawn and deposited in the name of and to the credit of Rapp in the Humboldt Savings Bank. Thereafter, and until the time of his death, July 11, 1914, Rapp claimed to hold and own such sum as his individual property.

The defendant's answer denied all of the material allegations of the plaintiff's complaint save and except the allegation of the presentation and rejection of the claim against the estate of the deceased.

Upon the issues thus framed the cause was tried by the court without a jury, and its findings of fact were in substance and effect that Martin L. Gates and his wife, Julia Gates, did not, while living together as husband and wife, accumulate the sum of one thousand nine hundred dollars or any sum of money whatever, of which she, the wife, had control and which she deposited in the Savings Union Bank and Trust Company; that Julia Gates did not on the twenty-first day of June, 1914, give to George Rapp, the deceased, an order upon said bank or any other bank for the sum of one thousand nine hundred dollars, or any other sum, but that said Julia Gates did, on or about the twenty-ninth day of January, 1914, upon the death of Gertrude Rapp, the mother of Julia Gates and George Rapp, deceased, transfer an ac-

count in the sum of \$2,062.21, which stood upon the books of the Savings Union and Trust Company in the joint names of Julia Gates and Gertrude Rapp, her mother, to the joint account of Julia Gates and George Rapp, deceased; that said sum of money so transferred was not nor was any part thereof the community property of Martin L. Gates and Julia Gates.

The only point presented in support of the appeal is that the findings of the court to the effect that the money in suit was not the community property of Gates and his wife, is contrary to the evidence.

The evidence upon this phase of the case is direct and circumstantial and is, in our opinion, in substantial conflict. The evidence adduced in support of the plaintiff's case tended to show in substance that Julia Gates, about January 5, 1900, and while she was the wife of the plaintiff, deposited the sum of ten dollars with the Savings Union Bank, now known as the Savings Union Bank and Trust Company; and from time to time thereafter added to her account several small deposits until April 21, 1901, when she had to her credit and in her name the sum of \$121.13. On the last-mentioned date this account, which was entered as an "ordinary deposit," was transferred to a "term deposit account," and continued in her name until December 31, 1902, at which time it aggregated the sum of \$209.81. On March 11, 1903, this account was transferred to Mrs. Gertrude Rapp (the mother of Julia Gates), and while standing in her name was, on March 26, 1903, increased by a single deposit of \$250. On July 30, 1904, the balance of \$180.68 remaining to the credit of the last-mentioned account was transferred to Julia Gates as a savings deposit account and numbered 92,003, which was the number originally assigned to the account of Julia Gates when she made her first deposit with the bank. This account stood in the name of Julia Gates until July 18, 1911, at which time it showed a balance in her favor of the sum of \$1,776.89, as the result of numerous and frequent deposits ranging in amounts from ten dollars to one hundred dollars. On the last-mentioned date this account was again transferred from Julia Gates to "Julia Gates or Gertrude Rapp," and on and after December 31, 1911, was augmented by other deposits varying in amount from thirty-five dollars to one hundred dollars. On July 29, 1914, it aggregated the sum of

\$2,062.21, when it was transferred to "Julia Gates or George Rapp."

It may be conceded, as counsel for the plaintiff contends, that the fact that the initial and subsequent deposits of money credited to the several accounts standing in the name of Julia Gates were made while she was the wife of the plaintiff, created the presumption that the money thus deposited was community property. This, however, was a disputable presumption, and was, we think, overcome by other evidence in the case, direct and circumstantial, which tended to show that neither the money in suit, nor any part thereof, was accumulated as the result of the joint earnings of the plaintiff and the deceased, but rather was accumulated from the personal income of Mrs. Gertrude Rapp and her son, the decedent, George Rapp, and that the deceased merely held and handled the same in her name as their agent and trustee. Thus there was much convincing evidence tending to show that the plaintiff was a man of intemperate habits, and as a consequence earned but little money during his married life, which was never at any time wholly sufficient to supply the community necessities of husband and wife. True, the evidence shows that Julia Gates also contributed to the support of the community by working as a seamstress, but she secured such work only irregularly, and oftentimes, owing to frequent ill health, was unable for months to work at all, with the result that her average weekly earnings were from seven to nine dollars, which, it appears, when added to the intermittent earnings of the plaintiff, were no more than sufficient to provide for the daily needs of the community. This being so, it is improbable that Julia Gates could have saved any sum out of the community earnings, and it is highly improbable that she could have saved so large a sum as two thousand dollars. The money in suit, therefore, must have come from some source other than the joint or individual earnings of Gates and his wife.

This conclusion is fortified by the undisputed fact that the deceased was regarded by her mother, Mrs. Gertrude Rapp, as the business head of the Rapp family, and as such was intrusted with the family money, and that her mother upon several occasions gave her certain sums of money to be deposited in bank.

The foregoing is but a meager outline of the evidence adduced upon the whole case; but it will suffice, we think, to show that the presumption relied upon by the plaintiff was overcome by clear, certain, and convincing evidence within the meaning and character of such evidence as defined in the cases of *Lynam v. Vorwerk*, 13 Cal. App. 509, [110 Pac. 355], and *Freese v. Hibernia etc. Society*, 139 Cal. 392, [73 Pac. 172].

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 27, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1916.

---

[Crim. No. 352. Third Appellate District.—April 29, 1916.]

**In the Matter of the Application of C. F. PRECIADO for a Writ of Habeas Corpus.**

**CRIMINAL LAW—CONVICTION OF FELONY—ADMISSION TO BAIL PENDING APPEAL—DISCRETION.**—Admission to bail, pending an appeal from a judgment of conviction of a felony, is a matter resting wholly in the discretion of the trial court, and the exercise of such discretion should not be disturbed or ignored except in an instance of manifest abuse.

**ID.—LIBERATION OF DEFENDANT—WHEN PROPER.**—Such discretion should not be exercised in favor of the liberation of the defendant except in instances where circumstances of an extraordinary character have intervened since conviction, which makes it obviously proper.

**ID.—REFUSAL OF ADMISSION TO BAIL—ABUSE OF DISCRETION—ILL HEALTH OF DEFENDANT—SUFFERER FROM EPILEPSY.**—It is an abuse of discretion to refuse the application of a defendant for admission to bail pending an appeal from a judgment of conviction of embezzlement, where it is shown that he was suffering from epilepsy of the *grand mal* type.

**APPLICATION** for admission to bail pending an appeal from the Superior Court of Madera County from a judg-

ment of conviction of embezzlement. C. O. Busick, Judge presiding.

The facts are stated in the opinion of the court.

L. D. Windrem, R. B. Fowler, H. J. Maxim, and Joseph Barcroft, for Petitioner.

U. S. Webb, Attorney-General, J. Charles Jones, Deputy Attorney-General, and Stanley Murray, District Attorney, for Respondent.

**HART, J.**—The petitioner was convicted in the superior court of Madera County, on the thirteenth day of March, 1916, of the crime of embezzling public funds, he being at the time of the alleged commission of said offense tax collector of said county. Upon his conviction by the jury, he was remanded to the custody of the sheriff of Madera County and by that official incarcerated in the county jail of said county, wherein he is now and ever since his conviction has been confined.

He has taken an appeal to the appellate court from the judgment of conviction, and has inaugurated this proceeding for the purpose of obtaining an order admitting him to bail pending the determination of said appeal.

The writ was made returnable before and heard by two of the justices of this court.

The petition alleges that, upon the conviction of the petitioner, and before his commitment, "application was made to the Hon. C. O. Busick, trial judge, in behalf of your petitioner for bail, pending appeal to be taken, which said motion was denied upon the ground that no adequate showing had been made for admission to bail; that your petitioner, upon the date set for his sentence, to wit, on Saturday, the 18th day of March, 1916, gave due and legal notice of appeal from the judgment of said court, which said appeal is now pending and in process of perfection, and at the same time and place, another motion was made in behalf of your petitioner for admission to bail pending his said appeal, which said motion was by said trial judge denied."

The petitioner is, according to the petition and the proofs, a chronic epileptic, having suffered from epilepsy for a period

of over eight years, and being "subject to frequent violent attacks of the 'grand mal' form of said malady." It is alleged in the petition that the cell in which he is confined "is of metal, about four by seven feet in size, fitted with a hammock, an iron washstand and an iron toilet bowl; that the floor, ceiling and walls of said cell are of steel; that the corridor upon which said cell opens is built of steel in its entirety; that since the date of your petitioner's confinement, he has been seized with grand mal attacks six times." It is further alleged: "That since Tuesday, April 11th, 1916, your petitioner has been confined in his cell alone during the daytime, a brother remaining with him at night, by and with the consent of the sheriff; that up to the present time, there has been some other person present during seizures, but as there are no other person or persons confined with your petitioner at this time, your petitioner fears that subsequent seizures will result in grievous injury, and perhaps death, and that his continued confinement in his present quarters is fraught with serious impending danger to his life, and that his continued confinement pending his appeal is likely to result fatally."

The application for bail to the court below was based upon the uncontroverted affidavits filed by the petitioner. Some of these affidavits were by physicians who therein stated that the petitioner is and has been for a number of years subject to epileptic fits, and that the attacks were of the character known in medical science as the *grand mal* type, which is pronounced by experts in that science to be the most serious form in which that malady manifests itself. Other affidavits are by persons who personally witnessed and described a number of these attacks suffered by the petitioner since his incarceration in jail.

The same affidavits have been filed with the petition before us. In addition to these, there have been filed here, in behalf of the petitioner, the affidavits of J. J. Cramer, night jailer at the Madera County jail, and Henry and W. B. Preciado, brothers of the petitioner, and, by way of a counter-showing by the respondent, the affidavits of Drs. T. M. Hayden and C. P. H. Kjaerbye, and those of the district attorney of Madera County and J. F. Lewis, sheriff of said county.

It is conceded that the petitioner is an epileptic, that he suffers from intermittent attacks of that disease, and that

the paroxysms are very severe, or of the most serious form of that malady. It is stated in the affidavits upon which the application was made for bail before the court below and which affidavits, as seen, are among those upon which this application is made, that the petitioner has suffered six epileptic attacks since his confinement. The statement that he has had a number of attacks since his confinement was not denied before the trial judge, nor is it controverted here. On the contrary, it is conceded to be true.

The affidavits used in the application to the trial judge for bail disclosed, as here, that W. B. Preciado, a brother of petitioner, found it necessary, because of the condition of petitioner as alleged and described, that the latter should have some one with him in the county jail at all times to prevent injury resulting to him when seized with an epileptic fit, and that, by permission of the sheriff, he (W. B. Preciado) has remained with the petitioner during the night-time since the latter's confinement.

The affidavits of the physicians filed in behalf of the petitioner declare that it is the professional opinion of each of the affiants that "confinement in jail is greatly injurious to his (petitioner's) health and endangers his life."

The additional proof presented on this hearing in behalf of the petitioner shows that the latter has suffered two epileptic attacks since the date of the application to the trial judge for an order admitting him to bail—one occurring on April 14th and the other on April 16th.

The two doctors whose affidavits were filed here by the respondent each states that he made a professional examination of the petitioner on the twenty-first day of April, 1916; that, from such examination, he found petitioner to be "in good normal condition"; and "that his body was well nourished, his skin was clear, his urine normal, his eyes bright and temperature normal; that his pulse was 65, his lungs and heart normal, his tendon reflex normal, and that according to the statement of the said C. F. Preciado (petitioner) his appetite was good; . . . that he was in a cheerful state of mind, talked intelligently about his case; that he suffered, or seemed to suffer, no more from his confinement than the ordinary average prisoner suffers or seems to suffer from confinement." These affiants further state that they have been informed by the sheriff, his deputies, and the petitioner him-

self that the latter, since his incarceration, has had but four attacks or fits; that he has been confined in jail for five weeks and "that this number of attacks during this period of time is a decrease in number from the number he has suffered according to the testimony introduced at the trial of the said C. F. Preciado during the period of eight or nine years immediately before his confinement in the county jail," etc., and that "the said C. F. Preciado, due to his incarceration in the said jail, is not in imminent danger of death."

The sheriff, in his affidavit, deposes that the petitioner "during the whole of the period during which he has been confined, has eaten heartily, slept well, appeared to be in jovial spirits and has complained of no sickness or pain; that affiant has seen petitioner in one convulsion or spasm since his confinement which lasted from three to four minutes; that affiant has been informed by his deputies that petitioner has had but three other spasms or convulsions during the period of his confinement, the same in each instance lasting no longer than four minutes, and that he comes out of these attacks without any noticeable effects upon his health or general condition." The sheriff further deposes: "That a deputy sheriff has his desk within about eighteen feet of his cell door; that at least every half hour during each and every day a deputy sheriff is within sight of the said C. F. Preciado; that by reason of the close contact of deputies in the office with the said C. F. Preciado's cell it would be impossible for any commotion to occur therein without someone observing same and going immediately to his rescue; that during the night-time affiant has permitted the brother or some other member of the said C. F. Preciado's family to occupy a cot placed directly in front of the open cell door of the said C. F. Preciado; that affiant has extended this privilege not by reason of any fear of injury to the said C. F. Preciado but out of courtesy to the defendant and to the members of his family. That at night a deputy sheriff also sleeps in a room off of the corridor and within twenty feet of the cell of the said C. F. Preciado; that affiant does not believe that his incarceration at the jail at this time affects the health or physical condition of the said C. F. Preciado in any wise, or that the said C. F. Preciado is in any danger whatsoever by reason of his incarceration aforesaid."

The district attorney deposes that the trial of the petitioner covered a period of about three weeks, during which time (so that official declares upon information and belief) the petitioner suffered no epileptic attack; that (upon information and belief) the petitioner has had only four attacks during his confinement in jail, and likewise states that said attacks have not been of a severe character and have lasted not to exceed in any case four minutes, etc.

The foregoing embraces a statement in substance of the showing made both in the court below and here.

By the terms of section 1272 of the Penal Code, whether a person after having been convicted of a felony, not involving the death penalty, may be admitted to bail, is a matter resting wholly in the discretion of the trial court before which the conviction was obtained. Under section 1291 of said code, the authority to admit to bail, in cases in which the accused may be admitted to bail on appeal, is vested in any magistrate having the power to issue the writ of *habeas corpus*, or by the magistrate before whom the trial was had.

The settled rule in this state as to the matter of the application for bail after conviction and pending the determination of an appeal is that such application should be made in the first instance before the judge who tried the cause. (*People v. January*, 70 Cal. 34, [11 Pac. 326]; *People v. Perdue*, 48 Cal. 552; *Ex parte Turner*, 112 Cal. 629, [45 Pac. 471]; *Ex parte Hatch*, 15 Cal. App. 186, [114 Pac. 410]; *People v. Cornell*, 28 Cal. App. 654, [153 Pac. 726].) It has accordingly been declared that "the discretion in cases of this kind is vested primarily in the court that tried the case, or the judge thereof, and the determination of the latter should not be disturbed or ignored except in an instance of manifest abuse." (*Ex parte Turner*, 112 Cal. 629, [45 Pac. 471]; *People v. Perdue*, 48 Cal. 552; *People v. January*, 70 Cal. 34, [11 Pac. 326].)

Those cases further say that, since bail after conviction is purely a matter of judicial discretion, such discretion should not be exercised in favor of the liberation of a defendant pending appeal, "except in instances where circumstances of an extraordinary character have intervened since conviction, which makes it obviously proper."

In this case, as seen, there was no adversary showing attempted by the respondent before the trial judge. In the pro-

ceeding here, as has been shown, there is such an attempt, but, as we shall endeavor to show, the effect of the showing so attempted is not to raise a conflict in the proofs upon the vital question of fact involved herein. In other words, we are not of the opinion that the affidavits filed herein in opposition to those filed by the petitioner in any measure impeach or detract from the force of the showing made by the petitioner in the court below. The important question, then, to which we are required to address ourselves is whether or not the action of the trial judge, in declining to make an order admitting the petitioner to bail pending the determination of his cause on appeal, involved an abuse of discretion, or (in other language), whether the proofs adduced before us without conflict disclose that this is a case where circumstances of an extraordinary character have intervened since conviction, which makes an order admitting the petitioner to bail obviously proper, and that, therefore, the judge of the court below should have exercised his discretion favorably to the application of the petitioner for bail.

In determining this application, we have the right to consider the nature and characteristics of the malady from which the petitioner is shown to be a chronic sufferer. According to Dr. Spratling, a noted and accepted authority on epilepsy, that malady is defined as follows: "A disease or disorder affecting the brain, characterized by recurrent paroxysms which are abrupt in appearance, variable in duration but generally short, and in which there is impairment or loss of consciousness, together with impairment of motor co-ordination, with or without convulsions." The same author tells us that there is a variety of forms of epilepsy, the more prominent and serious of which are the *grand mal* and the *petit mal* types. The petitioner's malady, as will be recalled, has been diagnosed as of the *grand mal* or severer form of the disease. In the attacks of this form of the disease, which are always sudden and unexpected, so far as is concerned the particular time at which the seizures may occur, the body of the victim becomes rigid, his eyes are set and characterized by a stare, his face takes on a deadly pallor, his hands alternately clutch and open, his body jerks, trembles, and twitches convulsively, he has frothings at the mouth and he loses consciousness. When under such an attack, if then standing, his body will naturally and of course lurch and fall to the

floor. If lying down when the attack is on, it is not impossible and often happens, from the convulsive movements of the body, that the patient will fall from the couch or bed upon which he is lying.

Epilepsy is not wholly an incurable malady, and while there is, of course, always danger of a sudden fatal termination of the disease through a single, brief attack, there is still the added danger of death following from a single attack, not from the attack itself, but, when alone or unattended by anyone, from a serious injury suffered by the victim from falling and striking some hard substance, as, for instance, sustaining in the fall a fractured skull; or, if unattended by someone capable of affording him immediate assistance, he might die from suffocation.

Thus it will be perceived that, while it may be very true, as the doctors giving testimony here for the respondent declare, that the petitioner is not in imminent danger of death from the disease itself, the important fact nevertheless stands out that, the petitioner having suffered several attacks since his incarceration, there is a strong probability of a recurrence of them and that, when having such an attack, in the absence of an attendant able to give him proper or the necessary protection and attention, he is in great danger of falling and thus striking the floor or some other solid substance with a very serious, if not fatal, result, or being unattended and without proper and timely assistance, he might, in one of those paroxysms, die from suffocation. (Spratling on Epilepsy, p. 304.) Thus the necessity of constant special care and attention at the hands of someone capable of administering such care and attention is plainly manifest. That he cannot receive such care and attention under the unfortunate circumstances by which he is now beset, is obvious, and it necessarily follows that he is at all times under imminent danger of receiving injuries from which his death might ensue.

Neither the fact that a brother of the petitioner has been permitted to remain with him during the night-time of each day, nor the fact that a deputy sheriff occupies quarters in the jail within twenty feet of the cell occupied by the petitioner, where he (the deputy) can readily and distinctly hear the noise or commotion usually accompanying or resulting from the attacks from which the petitioner suffers, relieves the situation or answers the proposition that the life of the

petitioner is in jeopardy and will so remain so long as the petitioner is circumstanced as he now is. The ministrations of the brother of the petitioner are, of course, prompted by considerations of brotherly sympathy and affection, but they are purely voluntary and his presence in jail a matter of license or privilege. Neither he nor any other person should be required to undergo self-imposed imprisonment, however laudable may be the purpose or the motive of such a sacrifice. The law does not contemplate or require it. As to the fact that a deputy sheriff occupies quarters in close proximity to the petitioner's cell and thus is enabled to hear any noise proceeding from said cell, the obvious reply is that the very "noise" or "commotion" which the officer declares would readily attract his attention might be the effect of the very thing to be guarded against—injury to the petitioner from a fall while under the influence of an epileptic attack.

Under the peculiar circumstances of this case, we are convinced that the petitioner, suffering as he was and is from the most serious form of a disease which is dangerous to life not alone in and of itself, but also because of the external consequences of the malady, should at all times be attended by some person competent to protect and assist him when, by reason of the recurrent violent manifestations of the disease, he is wholly powerless to protect or assist himself, and, moreover, should be afforded a better opportunity than his present circumstances will permit to receive special treatment at the hands of a specialist in diseases of the character of that with which he is afflicted.

We are, therefore, constrained to the conclusion that the circumstances of this case, as developed by the record in the proceeding for bail before the court below, are of such a character as to have called for the exercise of the discretion vested in the trial court or judge in such matters favorably to the application for bail, and that the learned trial judge in a legal view abused that discretion by refusing to make the order. And, since, as we have above pointed out, the showing before us is, substantially, the same as that made before the trial judge, notwithstanding the purported adversary showing herein by the respondent, which showing was not made before the trial judge, there is nothing herein to preclude us from resting our decision upon the determination of the question whether the trial judge did so abuse his discretion.



In accordance with the foregoing views, it is ordered that the petitioner be and he is hereby admitted to bail pending the determination of his appeal from the judgment of his conviction of the crime of embezzlement, upon giving an undertaking as required by law in such cases in the sum of ten thousand (\$10,000) dollars, said undertaking to be approved by the judge of the superior court of the county of Madera.

Chipman, P. J., concurred.

---

[Civ. No. 1472. Third Appellate District.—May 1, 1916.]

**OLSON-MAHONEY LUMBER COMPANY (a Corporation) et al., Respondents, v. DUNNE INVESTMENT COMPANY (a Corporation) et al., Appellants.**

**MECHANICS' LIENS—BUILDING CONTRACT—ABANDONMENT BY CONTRACTOR—AMOUNT APPLICABLE TO LIENS—RULE PRIOR TO CODE AMENDMENT.**—Where a building contract had been abandoned by the contractor prior to completion of the work, the portion of the contract price applicable to the liens of other persons than the contractor was, prior to the repeal of section 1200 of the Code of Civil Procedure in the year 1911, the difference between payments made to the contractor and the value of the work and materials done and furnished at the time of such abandonment, including materials then actually delivered on the ground, "estimated as near as may be by the standard of the whole contract price," and not by the actual value of such work and materials.

**ID.—TIME OF FILING LIEN—CESSATION OF LABOR—PLEADING AND EVIDENCE.**—Where in an action for the foreclosure of a mechanic's lien, it is alleged in the complaint that there had been a cessation of labor for a period of thirty days, which, if true, would have shown that the lien was filed too late, and it appears from the evidence introduced without objection, and the admissions of the answer to the complaint that there had not been such a cessation, and also that no notice of cessation had ever been filed of record, the averment of the complaint may be disregarded and the finding of the court upon the evidence accepted.

**ID.—PLEADING—OMISSION TO ALLEGE TERMS OF CONTRACT—EVIDENCE OF LIEN—EFFECT OF.**—An objection that the complaint in an action to foreclose a mechanic's lien failed to allege that the lien contained a statement of the terms, time given, and conditions of the con-

tract, cannot be considered on an appeal from the judgment, where no demurrer was interposed to the complaint and the lien, which contained such statement, was admitted in evidence without objection.

**ID.—COMPLAINT AND LIEN—LACK OF VARIANCE.**—There is no variance between the complaint in an action to foreclose a mechanic's lien and the lien itself, sufficient to justify a reversal of the judgment, where it is alleged in the complaint that the contractors agreed to "pay the plaintiff the reasonable value of the material [lumber and mill work] in cash and upon delivery," and the lien recited that the agreement was that the materials were to be paid for upon delivery in accordance with the prices carried out against the various items, and that the materials were of the reasonable value as in the notice set forth.

**ID.—LUMBER USED FOR "CONCRETE FORMS"—RIGHT TO LIEN.**—Lumber furnished to be used for "concrete forms" which did not enter into or become a part of the building, is lienable, where it is shown that the building could not have been erected without the use of lumber made into such forms into which the concrete was poured, there to remain until thoroughly "set" for fifteen or twenty days.

**ID.—CESSATION OF WORK AND COMPLETION OF BUILDING—CONTRADICTORY AVERMENTS—EFFECT OF ANSWER.**—Contradictory averments in or statements not true in the complaint, as to cessation of work and completion thereof by the contractor, when at variance with the findings, are not fatal to recovery, where the answer cures the contradiction of misstatements, and the findings are as alleged in the answer and supported by uncontradicted evidence.

**ID.—ORDER CONSOLIDATING ACTIONS — EFFECT UPON DEFECTIVE PLEADINGS.**—Where actions for the foreclosure of mechanic's liens are consolidated, the effect of the order of consolidation is to unite the causes of action so as to constitute one cause of action and one pleading, and the allegations in one complaint will remedy defects and supply omissions in another.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Mastick & Partridge, Bartlett & Langdon, and Charles A. Christin, for Appellants.

Corbet & Selby, Morrison, Dunne & Brobeck, Wright & Wright, Olney, Pringle & Mannon, J. R. Pringle, Robert R. Moody, Frank A. Duryea, Arnold W. Liechti, Olin L. Berry, Neal Power, George F. Hatton, Gus L. Baraty, W. C. Webb, Hartley F. Peart, and D. Hadsell, for Respondents.

CHIPMAN, P. J.—Fourteen separate complaints were filed to enforce mechanics and materialmen's liens, and by order of the court were consolidated and tried in one action. The plaintiffs in eleven of these several complaints are respondents and the appeal is here under the above title. Judgment was entered in favor of plaintiffs and from this judgment defendants appeal.

Defendants Condon and McGlynn were the contractors for the work; certain named persons defendants were owners of the property on which the building in question was erected, and defendant Dunne Investment Company was the owner of a lease executed by said owners, and erected said building in compliance with the terms of said lease. The building is situated on the northwest corner of Stockton and Ellis Streets, San Francisco.

The complaints were filed in the latter part of the year 1909 and were brought to issue by answers in 1910 and, on January 4, 1912, came on for trial, and findings of fact and conclusions of law were made on June 27, 1912, and judgment was entered on that day. Notice of appeal was served and filed July 27, 1912. Transcript on appeal was filed in the supreme court May 15, 1914. Appellants' brief was filed September 15, 1914, and respondents' brief was filed May 11, 1915. The cause was transferred to this court and papers filed here December 17, 1915, and appellants' reply brief filed here January 18, 1916. It thus appears that more than two years expired after the actions were commenced before they were brought to trial. Nearly two years elapsed thereafter before transcript was filed in the supreme court. A year more passed before respondents' brief was filed, and appellants' reply brief was not filed until January 18, 1916, at which time the cause was submitted. We take the liberty of calling attention to the record as typical of many cases coming by transfer to this court as showing that the delay in reaching judgments on appeals in many cases is not, as is popularly believed, the fault of the appellate courts, but of the attorneys in the cases, brought about by stipulations which the courts feel bound to respect.

The attack is first made upon the finding upon which the judgment is based for the reason that it ignores the element of proportion to the whole contract price; that the evidence is insufficient "to sustain the finding even as to the amount

and that there is no finding of the ultimate facts, but finding No. 10 is only a conclusion of law." Appellants then assail the proceedings in each of the eleven cases on various grounds, some of which are common to all of them while other grounds are urged to particular cases.

The contract price for the building was \$52,750, and the contract, with its plans and specifications, was duly recorded before the work was commenced. Work commenced under this contract October 26, 1908, and continued until July 15, 1909. The contractors being unable to complete the building, the Dunne Investment Company gave three days' notice, as provided in the contract, to furnish the necessary labor and materials to finish the building, which the contractors being unable to do, the Dunne Investment Company employed one Charles Wright to complete the job. The contractors had received, when they abandoned the work, \$31,397.50. The liens filed amounted to about twelve thousand dollars.

The contract provided that payments for the work should be made on the first of the month "as the work progresses, in installments, based upon the monthly estimates of all work done and material furnished and paid for in the building, up to and including the last day of the preceding month, in sums equal to seventy-five per cent of the value of said work done and material furnished, to be estimated by the architect, provided that no more than seventy-five per cent of the whole contract price shall be paid up to the time of the completion." There was the usual provision deferring payment of twenty-five per cent. "The monthly estimates of the architect, however, subject to correction by him in any subsequent monthly or in his final estimates. Serving merely as a basis for payments on account they are presumed to be only approximate."

Finding 10 is as follows: "That the value of the work and materials already done and furnished by said Condon and McGlynn on July 15, 1909, under said contract, including materials then actually delivered or on the ground, estimated by the standard of the whole contract price, under said contract, was and is \$41,863.33."

The court found that there was the sum of \$10,465.83 subject to the various liens, being the difference between the amount of the work and materials done and furnished, namely, \$41,863.33, and the amount paid to the contractors,

namely, \$31,397.50. That is, the payment in excess of the certificates given by the architect of seventy-five per cent of the work as it progressed, as provided in the contract, was the sum of \$10,465.83 and was subject to liens in accordance with the rule enforced in the case of *Olson-Mahoney Lumber Co. v. Maxwell*, 18 Cal. App. 668, [124 Pac. 100].

It is well settled that, prior to the revisory statute of 1911 (Stats. 1911, p. 1313), under section 1200 of the Code of Civil Procedure, the actual value of the work and materials is not the test, but the value "estimated as near as may be by the standard of the whole contract price." (*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, [97 Pac. 152]; *Duffy Lumber Co. v. Stanton*, 9 Cal. App. 38, [98 Pac. 38]; *Olson-Mahoney etc. Co. v. Maxwell*, 18 Cal. App. 668, [124 Pac. 100].)

Appellants contend that the value of the work and materials as found by the court represented the actual value and not the value estimated by the standard of the whole contract price, and that the court reached its estimate by a mathematical calculation, to wit, by dividing \$31,397.50, the amount paid the contractors, by .75, thus giving exactly the sum found, namely, \$41,863.33. "Other than this mathematical calculation," it is claimed, "there is not a word of evidence to sustain the finding."

Witness Applegarth was the architect of the building and made the estimates of the work as it progressed and issued certificates therefor. He testified "that \$31,397.50 was three-fourths of the value, or possibly a little less than three-fourths of the value, of the portion of the work done by the Condon-McGlynn Company on the Dunne Building, estimated by the contract price for the whole. We were conservative always so as not to overstep the limit. So I am sure that it was not more than three-fourths of what they had done estimated by the price of the whole." Again, he testified: "These certificates were our estimates of the value of the work done in the period covered by the certificate estimated by the contract price." Again: "We issued our certificates on the basis of three-fourths of the value of the work done estimated by the whole contract price." He testified that he helped superintend the construction of the building, and was at that time more familiar with the cost of the work required to be done on the building than at the

time he was testifying (two years later). He testified: "In giving the certificates we investigated the cost of doing what had to be done there and it was fresh in my mind when I gave the certificates, and the certificates I made at the time were my estimates at that time of three-fourths of the value of what had been done there, measured by the contract price for the whole. The contract price was less than the reasonable value of the contract for the building in my judgment." He also testified: "Leaving out the contract price of the Dunne Building under the Condon & McGlynn contract, the reasonable market value of what the Condon-McGlynn Company did before they ceased work there was about \$47,000.00" Later in the course of the trial, the architect revised his estimate, reducing it from forty-seven thousand dollars to \$35,736.50, whence by applying the rule in *Hoffman-Marks Co. v. Spires*, appellants derive \$30,785 as the true value estimated on the basis of the contract price and, therefore, it is claimed there was nothing subject to the lien.

Witness Charles Wright, who took the contract to complete the building, testified that the actual value at abandonment was \$32,850. The testimony of this witness on cross-examination showed that he underestimated the cost of different parts of the work very materially, and that his figures given for various items entering into the cost of completing the building were unreliable, and for reasons shown his estimate of such cost did not represent the reasonable cost of completing the building under the original contract. It was alleged by defendants, in their verified answer to each of the complaints, that they had paid to the contractors "a sum equal to 75% of the value of said work done and material furnished as estimated by the architect, and that the said sum was at no time more than 75% of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price," and that the amount so paid was as already stated. Appellants say as to this averment in their answer that it "is not binding, in view of the fact that the evidence, as a whole, establishes that these payments were in reality 75% of the value of the amount actually in the building."

Section 1200 of the Code of Civil Procedure directs that the value of the labor and materials done and furnished at the time of abandonment shall "be estimated as near as may

be by the standard of the whole contract price." Any just method of arriving at this result may be adopted. There was evidence warranting the court in finding that the value of the labor done and materials furnished when abandonment occurred was greater than seventy-five per cent of the value as estimated by the court, so that appellants cannot complain that the amount was excessive. Just to what mental or mathematical process the court resorted it seems to us immaterial if the result was justified. It may be, and probably was the fact, that the court was satisfied with the architect's testimony that the certificates given by him could safely be assumed as a basis for its finding, especially as he had testified that the value of the labor and materials done and furnished was forty-seven thousand dollars, and in view also of the admissions of the answers as well as the architect's testimony, that this seventy-five per cent "was at no time more than 75% of the value of the work and materials already done and furnished, estimated by the standard of the whole contract price." The estimate made by the architect was not, as claimed by appellants, for actual value but, as was admitted in the answers, and as testified by the architect, was a value "estimated by the contract price." We must assume that the court considered all the evidence in the case and was, we think, justified therefrom in making the finding it did, although it happens to be and probably was based upon the architect's certificate. Finding 10, *supra*, is, we think, a finding of fact and not a conclusion of law, as claimed by appellants.

It is further claimed that the court failed "to find the value of the work left undone" which, it is insisted, was essential "in estimating the amount subject to liens in cases where the contractor has not finished his contract." We understand our supreme court to have held that a finding as to the cost of completing the building is not necessary. (*Scheerer & Co. v. Deming*, 154 Cal. 138, [97 Pac. 155]; *Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, [143 Pac. 1025].) In the *Scheerer* case, the court said it was proper as matter of evidence, to consider this fact in determining what the value is. We must presume that the court did consider the evidence before it on this fact.

We come now to the attack made upon the several claims separately.

### OLSON-MAHONEY LUMBER COMPANY'S CLAIM.

The objections raised to this claim are: 1. That the complaint does not state a cause of action in this: (a) it shows that the lien was filed too late; (b) that it does not allege the value of the labor and materials in the building and on the ground at the time of the abandonment, based on the whole contract price, or contain "even an allegation of a fund subject to liens"; (c) the complaint "fails to allege that the lien contained a statement of the terms, time given, and conditions of the contract," as required by section 1187 of the Code of Civil Procedure. 2. That finding No. 6 is contrary to the admissions in the pleadings. 3. That the lumber charged for was used for concrete "forms" and did not form part of the building. 4. That there is a material variance between the complaint and lien, between the complaint and the evidence, and between the lien and the evidence.

It was alleged in the complaint that, on July 20, 1909, the "said contract was abandoned before the completion thereof and there was on said date an entire cessation of labor upon said unfinished contract and upon said unfinished building or structure" and, on said date, the defendant Dunne Investment Company entered into the occupation of said building and ever since has been and now is in the use thereof; that said cessation from labor upon said contract and upon said unfinished building or structure and said use and occupation of said unfinished building by said owner, Dunne Investment Company, continued for a period of thirty days and at the time of said cessation from labor there was in the hands of defendant, Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already furnished, estimated according to the whole contract price, sufficient to pay the claim and lien of the plaintiff herein." It is alleged that the notice of lien was duly verified and recorded December 14, 1909, and is made part of the complaint "and was filed within the time allowed by law." It is also alleged that no notice of the cessation of work on the building or of abandonment of work was ever filed in the office of the recorder.

The court found that there was an entire cessation of labor on the building on July 18, 1909, and that there never had been any notice of cessation of labor filed for record.

Several of the complaints alleged, and the court found, that within thirty days (in fact, within a few days) defendant "did enter upon said uncompleted building, exclude therefrom said Condon & McGlynn and all subcontractors . . . and said defendant did proceed to procure other materials and labor . . . and did complete said building . . . on November 16, 1909, and there was at no time a cessation of labor for thirty days on said building between said October 21, 1908, and said November 16, 1909."

Appellants say: If the allegation is true that there was a cessation of labor for thirty days after July 20, 1909, as alleged, the time for filing liens would commence to run August 19th, and the right to file a lien would at most expire ninety days thereafter. Hence the complaint did not state a cause of action because, as therein stated, the lien was filed December 14th. Attention is also called to the allegation in the complaint that defendant entered into occupation and use of the building on July 20, 1909, which, it is claimed, brings the case directly within *Robison v. Mitchel*, 159 Cal. 581, 591, [114 Pac. 984].

While the court found, as alleged in the complaint, that there was a cessation of labor on July 18, 1909, it found, as we have seen, that no notice thereof had been filed of record, and the court also found that there was no cessation of labor for thirty days on said building and the same was completed November 16, 1909. This plaintiff filed its lien on December 14, 1909, and was in time, if we may follow the findings of the court instead of the averments of the complaint. In considering this and other of the objections, it is to be noted that there was no demurrer to the complaint, no motion for non-suit upon the close of plaintiff's testimony, and no motion made for a new trial. In defendants' answer it was alleged that the contractors abandoned the work on July 15, 1909, "whereupon the said defendant entered upon the said work, excluded the said Daniel E. Condon and Chas. J. McGlynn and their men and forthwith proceeded to procure other materials and labor and entered into another contract for said work, to wit: a certain contract with one Charles Wright," who agreed to complete the building according to the plans and specifications of the original contract. This contract was dated August 4, 1909, in which the contractor agreed "to enter upon the performance of the work on the 5th day of August,

1909, and to steadily proceed with and hasten the same to completion." The evidence showed that in fact there was no cessation of labor for a period of thirty days; that the contractor, Wright, carried out his contract, and in so doing must have been in possession of the building; and that defendant did not "enter into the occupation and use of the building" otherwise than to exclude the original contractors and to arrange for the completion of the building. No question was raised at the trial or objection to evidence as at variance with the pleadings. In this condition of the record we are fully warranted in disregarding the averment of the complaint that the cessation of labor continued for a period of more than thirty days and accepting the finding of the court. Appellant relies on *Robison v. Mitchel*, 159 Cal. 581, [114 Pac. 984]. In that case the complaint alleged and the answer confirmed the allegation, that the contractor ceased work on October 18th, and that the plaintiff thereafter, to wit, on November 19th, "undertook the completion of his said dwelling and proceeded to complete the same." The court held that the finding that "this cessation of labor did not continue for a period of thirty days" was not a finding within the issues, and being "in conflict with the admissions of the pleadings, cannot be considered." In the case cited, however, "the owner filed for record his verified notice of cessation, as contemplated by the opening paragraph of section 1187 of the Code of Civil Procedure," declaring in said notice that the work had been abandoned. It was admitted that the lien "was not filed within time if the notice of cessation and abandonment filed upon November 19, 1906, set running the statutory period for filing the lien." This was a case where the statutory notice had been given by the owner, and it undoubtedly started the running of the statutory period for filing the lien, unless the facts were that the work had not ceased for that period and ten days thereafter, as was alleged in the notice of abandonment. Under the peculiar facts of that case the trial court felt warranted in finding that there had not been a cessation of labor for the period of thirty days, thus disregarding the admissions of the pleadings, which the supreme court held was unauthorized. In the case here the finding has the support of uncontradicted evidence, and of the admissions of the answer, and the further very important fact that no notice of cessation of labor was

given. The case cited, it seems to us, not only fails to support appellants' contention, but rather demonstrates its fallacy.

The complaint alleged as follows: "At the time of said cessation from labor, there was in the hands of the defendant, Dunne Investment Company, after deducting the payments actually due and made under said contract for the value of the work and materials already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of the plaintiff herein." It is now urged against the sufficiency of this averment that it does not allege that defendant had "any fund *subject to liens*." Defendant states in its brief "it may be that this plaintiff *intended* to allege that it had in its hands and subject to liens sufficient money to pay the claim, but the complaint does not say so." Had plaintiff's failure to express its intention been pointed out by special demurrer no doubt the additional allegation would have been made. The record shows, however, that the fact here omitted constituted one of the issues tried without objection, which we think cured the defect.

The objection that the complaint "fails to allege that the lien contained a statement of the terms, time given and conditions of the contract," as required by section 1187 of the Code of Civil Procedure, is, we think, satisfactorily met. In the first place, the lien was admitted in evidence without the objection now urged being made. The complaint alleged that the notice of lien was filed, giving the date, and that it "contained, among other things, a description of the property thereby sought to be charged, as hereinbefore set forth, a statement of the names of the owners or reputed owners of said land and building or structure, to wit: [giving the names] . . . and said notice also contained a correct statement of the demand of plaintiff for said materials furnished after deducting the just claims and offsets." It is then stated that the notice was duly recorded and reference is made to it and it is made part of the complaint. The lien contains a statement of the terms, time given and the conditions of the contract. The complaint and notice of lien must be read together as the latter is distinctly made part of the complaint. (*Newell v. Brill*, 2 Cal. App. 61, [83 Pac. 76]; *Coss v. MacDonough*, 111 Cal. 662, [44 Pac. 325].) In the absence of a demurrer, and in view of the fact that no objection was made to the introduction of the lien in evidence, and that

there was no denial in the answer of plaintiff's averments, the point, in our opinion, should not now be considered.

It is objected that there is a variance between the complaint and the lien, the complaint and the evidence, and between the lien and the evidence. The lien states that the contractors "requested claimant to furnish lumber and mill work for said building and agreed to pay for the same upon its delivery; that claimant, at the special instance and request and in accordance with the agreement of said [contractors] furnished lumber and mill work for said building on the dates hereinafter mentioned to the amount and extent presented by the various sums set opposite the respective dates, viz.": (Then follow the items showing date, quantity of material and mill work and price.) "No time was given and there were no other terms or conditions of the said contract." It is then stated that claimant performed its agreement "and supplied said lumber and materials as specified herein and said materials are of the reasonable value of \$2,902.99, and the same were actually used in, upon and about said building." The complaint alleged that, for said lumber and mill work, the contractors "agreed to pay the plaintiff the reasonable value thereof, in cash, and upon the delivery of said lumber and mill work; that no time was given and there were no other terms or conditions to said contract except such as the law implies; . . . that the reasonable value of said lumber and materials is set opposite the respective dates as follows": (Then follow the items as in the notice of lien.) The evidence showed that the lumber was sold at a fixed price agreed upon with the contractors. "That the lumber and mill work furnished by the Olson-Mahoney Lumber Company for the building in question were furnished at the reasonable market price prevailing at San Francisco at the time the lumber and mill work were furnished." The introduction of the lien was objected to "on the ground that there is a variance between the evidence and the lien." In the decision rendered by this court in *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, [111 Pac. 760], it was said in the opinion by Mr. Justice Hart: "The object of the statute in requiring the conditions and terms of the contract to be set forth correctly in the notice of lien is to 'inform the owner as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits.' . . . And the test as to the sufficiency of the notice with re-

spect to the terms and conditions of the contract is whether such notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal. If, however, there is a substantial agreement between the contract and notice of lien, so that there could not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, then any technical variance which might appear would be immaterial." In that case the contention was that while the complaint charged that plaintiff was "to receive for said materials [corrugated iron] the reasonable market value of the materials so furnished, the evidence shows that such corrugated iron was sold and furnished for a definite or stipulated price agreed upon by the parties." Of this contention the court said: "Conceding that the evidence shows that the price charged for the corrugated iron was definitely fixed and expressly agreed upon at the time it was sold to the contractor, it nevertheless further appears from the evidence that said price or sum constituted the market value of the materials at the time of the sale. The statement in the notice of lien was, therefore, substantially true, which was all that was required to give it validity."

In the present case it seems to us that anyone reading the notice of lien would see that the agreement was that the materials were to be paid for, upon delivery, in accordance with the prices carried out against the various items, and that the materials were of the reasonable value as in the notice set forth, for it states that reasonable value was as the price shown. The complaint stated that the agreement was to "pay the plaintiff the reasonable value thereof, in cash, and upon the delivery of said lumber and mill work." The evidence was that the prices were both the market value and the reasonable value as well as that the agreement was to pay a price agreed upon. We do not think that the notice of lien was insufficient, nor do we think there was any variance as claimed by appellant such as would justify a reversal of the judgment. (See *Blanck v. Commonwealth Am. Corp.*, 19 Cal. App. 720, 726, [127 Pac. 805], and cases there cited.)

It is next objected that the lumber furnished by plaintiff was used for concrete "forms" which did not enter into or become a part of the building and hence no lien attached. Appellant rests its point in its opening brief upon the case of

*Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, [74 Pac. 357]. That case was decided in 1903, before concrete came into general use in the construction of buildings and it involved conditions wholly unlike those connected with concrete structures. The contract was for the erection of a bridge to consist of five spans and the balance of steel or wood. Except as to the steel spans the bridge was completed, but some delay arose in obtaining steel for the uncompleted part, and a temporary structure was agreed upon of timber over which the cars could run. "This structure rested upon planks laid on the ground and was not in any way physically connected with the bridge, except that on it was laid the permanent track consisting of stringers, ties and rails." It was soon after replaced by the steel structure originally contemplated, the "effect being to leave the track supported by the new steel structure in place of the wooden structure removed." Part of the lumber furnished by plaintiff went into this temporary structure and was afterward carried away by the contractors; and it was claimed by defendant that plaintiff's claim of lien should be reduced by this amount. The lower court held otherwise but the supreme court reversed the judgment. It was said in the opinion: "It is settled by many decisions in this state that to entitle a materialman to a lien under section 1183 of the Code of Civil Procedure the materials must be furnished to be used, and must be strictly used, in the construction of the building or other structure against which the lien is sought to be enforced [citing cases]; and this we understand means the materials must be used, not merely in the process of construction, but 'in the structure'—that is to say, they must be used as the materials of which it is constructed." (Citing cases.) Strictly applied, the rule here laid down would exclude the lumber used for "forms" in constructing a concrete building, for it does not constitute a part of "the materials of which it is constructed." The question seems not to have been passed upon by our supreme court. Its wide application justifies its careful consideration.

The evidence was that this building could not have been erected without the use of lumber made into forms into which the concrete was poured there to remain until thoroughly "set," that is, for a period requiring, as the evidence showed, from fifteen to twenty days. The lumber was then removed

and was of no value thereafter. The evidence was that some of it was given away; none was used for another job and the contractors advertised in the daily papers to get rid of it for firewood. The contract called for a reinforced concrete building to be erected by the use of wooden forms. The provision was: "Forms must be constructed so as to properly sustain the total weight of the concrete floors and beams during construction without deflection and shall be thoroughly braced and held in place to avoid any delay during construction to allow of the setting of the concrete." After making specific provision as to how the lumber was to be used and what kind was required, the contract provided: "Forms shall be so constructed that their inner surface shall conform strictly to the dimensions called for by the plans. . . . No form design shall be adopted or the lumber sizes collected (selected?) without the approval of the architect and the architect's approval does not relieve the liability of the contractor for the strength of the forms." We mention these provisions as showing the intimate connection of the "forms" with the erection of the structure and their indispensability.

In the case of *Pacific Sash and Door Co. v. Bumiller*, 162 Cal. 664, 667, [41 L. R. A. (N. S.) 296, 124 Pac. 230], where materials were furnished for the alteration of a building, it was held: "Lard-oil applied to the threads of joints of pipe used in the structure, insulated or covered electric wire used for drop lights attached thereto, paste for soldering joints, asbestos comprising a part of the electric switch-board, all constitute parts of the structure and a lien may be asserted therefor. Some soapstone was used on the inside of pipes, as a lubricant, to facilitate the pulling of wires through the pipes. This, being a part of the work of construction, we think it may also be considered as a part of the material used in construction, for which a lien may be claimed." Soapstone as a lubricant constituted "no part of the materials of which the building was constructed," as was the test in the *Stimson Mill Co. case*, *supra*, but it "was material used in the construction" of the building which was the test in the *Pacific Sash & Door case*, *supra*, and should, we think, be the test here. In thus holding we are but applying the familiar rule that the language of a statute must be construed so as to adapt it to changing conditions the result of improved methods and the progress of inventive arts. In its reply brief

appellant cites other cases in support of its contention. *Kennedy v. Commonwealth*, 182 Mass. 480, [65 N. E. 828], was an action by bill of equity which under the statute was maintainable "if the petitioner have a claim that might be a subject of mechanic's lien if the structure belonged to a private owner." The statute provided security "for all labor performed or furnished and for all materials used in such construction or repair." The contractors agreed to furnish material for and to construct all the concrete foundations and arches required for the construction of a pumping station and gate house at Spot Pond in Storeham." It appeared that the lumber "did not enter into the construction of the pumping station and gate house as a part of the permanent structure, but was bought and used again for a similar purpose in another place and, after being so used several times, was removed by the purchasers, some of it being finally sold for firewood and the rest being carried to the yard of the purchasers in Boston." It was held that plaintiff could not recover. "To acquire a lien for materials under the Pub. Sts. c. 191, it is necessary," said the court, "to show that the materials will form a part of the completed structure—that they will enter into it and become a part of the realty."

In *Darlington Lumber Co. v. Westlake Const. Co.*, 161 Mo. App. 723, [141 S. W. 931], where the facts were substantially the same as in the present case, the St. Louis court of appeals deduced the following rule: "Where certain material is provided for by the contract in erection of a structure, and is furnished and used accordingly, and is, either in whole or in part, consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation in the market value of the material by the use provided for by the contract."

In *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, [36 L. R. A. (N. S.) 875, 130 N. W. 866], the contract was to build a dam and materials were used in the construction of a temporary coffer-dam the erection of which was necessary to the permanent dam. The contractor abandoned the work and the owner took possession of the work, using for it the material left by the contractor includ-

ing that in the coffer-dam. About one-sixth of the material was destroyed by use, and the major portion of the planking when removed was capable of use in some other similar dam, and had, at the time, a market value of four or five dollars per thousand, but, after the removal, the owner used it in tramways and in planking and after the completion of such use it had no value except for firewood. At the completion of the work there would remain about fifty per cent of the lumber furnished, a large share of which would be unfit for anything but fuel, and the balance fit for use only in other dams and worth about five dollars per thousand. The planking cost sixteen dollars per thousand and constituted about three-fourths of the lumber claimed. The hardware used in the coffer-dam was of no value except as scrap iron. It was held that there was such a consumption of materials in the erection of the coffer-dam as to entitle the materialman to a lien on the permanent dam under the statute giving a lien to a materialman who furnishes any materials "for, or in or about the construction, erection, repair," etc., of any structure which becomes a part of the freehold. *Kennedy v. Commonwealth*, 182 Mass. 480, [65 N. E. 828], *supra*, was much relied upon by appellant in that case, as to which the court said it was apparent that "the materials were regarded as appliances or tools." Said the court: "So far as the concrete forms are concerned, we are inclined to agree that, where such forms are removed and are intended to be used and in fact are used again in other buildings, they should properly be regarded as appliances." In speaking of the cases where the value of explosives used in preparing the ground or rock for the structure and liens have been granted, the court said: "In these cases the liens have been granted upon one general principle or idea, namely, that where the material is used directly upon the work or structure itself, instrumental in producing the final result, and is actually consumed in the use, it may be said in every true sense it has entered into and forms a part of the contemplated structure." The opinion easily distinguishes the case from one where "coal is used in portable engines, or oil in lubricating building machinery, or food eaten by the laborers." "They are at least one step further removed from the actual work of construction. They have neither physical contact nor immediate connection with the structure at any time."

The logic of the decision in cases where powder is used 'does not,' said the court, "depend upon the special character of the material, nor upon the extreme rapidity of its consumption, but upon the fact that it is consumed necessarily in the process of constructing the building or other structure, and that its life has gone into the fabric of the structure as effectually as has the stone or cement or the lumber which retains its existence as a part of the structure." The principal case as to explosives is *Schaghticoke Powder Co. v. Greenwich & Johnsonville Ry. Co.*, 183 N. Y. 306, [111 Am. St. Rep. 751, 5 Ann. Cas. 443, 2 L. R. A. (N. S.) 288, 76 N. E. 153]. A lien was allowed in such a case in *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, [20 Pac. 419]. The question, however, was not discussed. Judge McFarland dissented, stating, among other grounds, that a "materialman cannot have a lien for exploded powder after, like the 'unsubstantial pageant' in *The Tempest*, it has 'melted into thin air, into thin air.' "

*B. F. Avery & Sons v. Woodruff*, 144 Ky. 227, [137 S. W. 1088, 36 L. R. A. (N. S.) 866], was a consolidated case in which it was agreed as to one of the claims that of the lumber used in forms for the concrete building being erected, "nothing remained of any of said lumber but about 10 per cent, which was in a cut-up, sawed-up, and dirty condition, such remnants being the molds (forms) knocked to pieces." The Kentucky statutes provide: "A person who performs labor or furnishes materials in the erection, altering, or repairing a house, building, or other structure . . . or for the excavation of cellars . . . or for the improvement in any manner of real estate . . . shall have a lien thereon." The court said: "If the lumber had been furnished to make a scaffold, molds, or forms, with the intention of using them in the erection of that building, and then carry them away and use them in constructing other buildings, then no lien would attach, as they would be regarded as a part of the appliances of the workmen, and would occupy the same place as a hammer, saw, or other tool used by the workmen, for which no lien is allowed by the statute (some states do, however, allow liens for scaffolds). These appellees furnished material to be used in the erection of a building which was as necessary as the sand, cement, water, or other material. In fact, the building could not have been erected without lumber to be used for the purpose for which

appellees' was furnished." In a note the editor takes occasion to refer to *Darlington Lumber Co. v. Westlake Constr. Co.*, 161 Mo. App. 723, [141 S. W. 931], a Missouri case, and *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, [36 L. R. A. (N. S.) 875, 130 N. W. 866], the Wisconsin case, and, while saying that they are in the minority, remarks: "They can hardly be cast aside and disregarded for that reason, for at this writing [1912], they are about the last words on this peculiar phase of the mechanics' lien law, and are based upon a sound distinction which has always existed and whose observation (observance?) progress now makes desirable."

Further pursuit of the question is deemed unnecessary. We do not think a general rule could be safely stated to govern all cases where lumber is used in making forms for concrete work in the construction of work contemplated by the mechanics' lien law. Each case must be governed by its own fact. This much, we think, however, can be said, and it is as far as the exigencies of the present case require; that, under the circumstances or facts shown, plaintiff is entitled to a lien for the materials it furnished and the mill work necessary for the preparation of such materials for use.

#### WESTERN BUILDING MATERIAL COMPANY'S CLAIM.

To this claim it is objected: 1. That the first two counts are contradictory, the first alleging an abandonment for thirty days, on July 14, 1909, and the filing of a lien on September 15; 2, the second alleging that the *contractors* (not the defendant) completed the building and that the lien was filed December 2, 1909. As to the first count it is pointed out that the court found against the cessation of labor for thirty days and hence the lien was prematurely filed; as to the second count no cause of action is stated "because there is no attempt whatever to allege a fund subject to lien"; that there is a material variance between the complaint and the lien and between the complaint and the evidence.

Respondent calls attention to the fact that the complaint was filed prior to the decision in *Robison v. Mitchel*, 159 Cal. 581, [114 Pac. 984], under such decisions as *Johnson v. La Grave*, 102 Cal. 324, [36 Pac. 651], holding that the contract was deemed abandoned when there had been a cessation

of work by the original contractor for a period of thirty days. After the decision in *Robison v. Mitchel*, a second lien was filed within thirty days after the completion of the building, "but only one suit was brought, both liens being pleaded as separate causes of action." The second lien was the one found by the trial court to be valid.

It is true that the findings are contrary to the allegations of the complaint: (1) That there was an abandonment of work for thirty days on July 14, 1909, and (2) that the building was completed by the contractors. The court found against the averment as to cessation of work and also found that the building was completed by defendant and not by the contractors. But this was in strict accord with the averments of the answer many times repeated, and in accord with averments in the complaints in the consolidated action. No pretense was made at the trial that the contractors completed the building, and it was not disputed at the trial that there was not a cessation of work for a period of thirty days. We do not think that contradictory averments in or statements not true in the complaint when at variance with the findings should be held fatal to recovery, where the answer cures the contradictions or misstatements, and the findings are as alleged by the answer supported by uncontradicted evidence. Allegations omitted or defectively stated may be cured or supplied by the defendant in its answer. (31 Cyc. 714; Bliss on Pleading, 437; *Donegan v. Houston*, 5 Cal. App. 626, 632, [90 Pac. 1073]; *Shively v. Semi-Tropic etc. Co.*, 99 Cal. 259, [33 Pac. 848].) It would be a vain thing to reverse the judgment on these grounds in order that the respondent might amend its complaint to harmonize with what the answer admits. It is quite obvious that the alleged variance did not mislead the defendant to its prejudice.

In this respondent's complaint there was a failure to allege a fund subject to liens. Respondent meets the objection by resort to allegations found in other complaints and by the considerations set forth under the Olson-Mahoney claim. This, we think, under the rule governing in a consolidated action, was allowable. This rule we understand to be that the effect of the order of consolidation is to unite the causes of action so as to constitute one cause of action and one pleading, and that allegations in one complaint will remedy defects and supply omissions in another.

In speaking of an issue in *Union Lumber Co. v. Simon*, 150 Cal. 751, [89 Pac. 1077, 1081], the court said: "This issue affected the right of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint." (*Wolters v. Rossi*, 126 Cal. 644, [59 Pac. 143]; *Coghlan v. Quartararo*, 15 Cal. App. 662, [115 Pac. 664].)

It is further urged that there is a variance between the complaint and the lien. The point is that the complaint relied on a contract for recovery. The averment is: "That the following is a statement of the terms, time given and conditions of the plaintiff's contract under which it furnished said building materials, to wit: Said Condon-McGlynn Company while working on said building or structure ordered from plaintiff, for use in said building, and delivered the same and charged therefor the actual value and market rate thereof."

The lien sets forth the character of the materials and their value and that no part of the same has been paid, etc.: "That the following is a statement of the terms, time given and conditions on which said building material was furnished, to wit: From time to time while said Condon-McGlynn Company were engaged in the construction of said building its duly authorized agent ordered from claimant for use in said building said material, to wit: Said crushed rock, and claimant furnished and delivered the same upon the order of said Condon & McGlynn Company and charged therefor the sum of six hundred and fifty dollars."

The lien says nothing about a contract, but the law implied a promise to pay. The complaint stated the facts the same way, but chose to say that the terms, time given and conditions of the contract were, etc., and it then follows the lien. We cannot assume that the pleader meant a contract other than such as would be implied from the facts stated.

#### FORD AND MALOTT CLAIM.

The only objection urged to this claim is that the allegation as to the work done and materials on hand at the cessation of work is insufficiently stated. What has been said in the preceding cases upon the point applies here.



# SANTA CRUZ PORTLAND CEMENT COMPANY CLAIM.

As to this claim, it is alleged that there is a material variance between the claim of lien and the evidence and that its statements are inconsistent in this—"it alleges that 2042½ barrels of cement were furnished, which at \$1.75, the contract price, would be \$3,574.37½. But the lien alleges that the reasonable value was \$3,849.68."

The lien states that respondent "furnished materials consisting of 2042½ barrels of standard Portland cement of the reasonable value of \$3,849.68, to be used," etc., under a certain written agreement. "Price. One dollar and seventy-five cents (\$1.75) per barrel f. o. b. cars at factory." Shipments to be made "in carload lots as ordered by buyer." It was stated that "three hundred and seventy-five pounds net of cement, packed in four bags constitute a barrel"; that the seller would pay five cents for each bag returned to the factories in good condition; seller to pay freight on returned bags; that no part of said \$3,849.68 has been paid except the sum of five hundred dollars, and there are no offsets except \$29.25 due to said contractors for sacks returned, and there is now due and unpaid the sum of \$3,320.43, etc.

The testimony was that respondent delivered to the contractors 2042½ barrels of cement under the contract; "that the total price of the same was \$3,849.68; that the reasonable value of said cement was \$3,849.68." It appeared that 722½ barrels were furnished not at the factory, as the contract called for, but from a warehouse in San Francisco, where respondent had it in storage; that the contractors were charged for all the cement at the rate of \$1.75 per barrel except as to the 722½ barrels there was added the freight from the factory to the city, \$114.56, and warehouse charges, \$16.25, and five cents each for 2042 sacks, \$144.50; that the 722½ barrels were furnished from the warehouse at the contractors' request "and they agreed to pay therefor the contract rate of \$1.75 per barrel plus the freight, warehouse charges and five cents for each sack. That 2042½ barrels was all the cement ordered by the Condon-McGlynn Company "and it was up to standard in every respect." The witness testified that there was due at the commencement of the suit \$3,320.43, from which should be deducted for sacks returned \$479.20, leaving due \$2,841.23. It thus appears that respond-

ent charged the contract price for the cement, \$3,574.37, to which was added \$275.31, being the freight and warehouse charges on the cement. The notice very clearly stated that the contract called for cement at an agreed price per barrel delivered at the factory f. o. b. cars. Nothing was said in the notice of lien of any other agreement, or that delivery might be made at San Francisco at the contract price plus freight and warehouse charges. This arrangement as to part of the cement might have been equally advantageous to the contractors, and as between respondent and the contractors was proper enough, but the defendant had a right to rely upon the terms stated in the notice of lien, for the purpose of the lien is to inform defendant of the extent of the lienor's claim. The notice here informed the defendant that the contractor had agreed to pay \$1.75 per barrel for the cement at the factory, but the owner was not informed that as to part of the cement a different agreement was made which, if enforced against defendant, would add materially to its liability. That all of the cement was not delivered at the factory is not material, as the price charged was the same at the factory and at San Francisco. The amount of respondent's claim, we think, should be ascertained without including the charges for freight and warehousing.

#### WILLIAM CRONAN CLAIM.

The point made is that the allegation of the complaint is insufficient to support the judgment under section 1200 of the Code of Civil Procedure. This allegation is as follows: "That at the time of said cessation from labor upon said unfinished contract and said unfinished building or structure, there was in the hands of the said defendant, Dunne Investment Company, after deducting the payments actually due and made on said contract between said defendant, Dunne Investment Company, and Daniel E. Condon and Charles J. McGlynn, as hereinbefore alleged for the value of the work and materials then already done and furnished, estimated according to the whole contract price, sufficient money to pay the claim and lien of plaintiff herein."

Whatever of insufficiency there may be in these averments it was cured by sufficient allegations in other complaints. It is further contended that the claim as allowed of \$2,179.50 must be reduced to \$1,714.

It appears that claimant had a specific contract for materials and work for the specific price of \$3,165 and that, up to July, 1909, when the work on the building was abandoned, the materials and work of claimant amounted to \$2,179.50, on which no payment had been made. The notice of lien set out the contract as above stated and that the labor and materials done and furnished under said contract at the cessation of work on the building was \$2,179.50, which the lien states was the reasonable value "estimated according to the market value thereof, also measured according to said contract price." It appeared that after abandonment claimant made a contract with Charles S. Wright to complete the work originally contracted for by claimant but at an increased compensation, the reason for which was fully explained. The witness testified: "At the time of making out his claim of lien of \$2,179.50, I took the same figures to make that item as I took in making the original bid" and "that the value of the materials already in at the time of the abandonment, based upon the contract price, was \$2,179.50." It was brought out, on cross-examination of the witness, that if he had figured in making the original contract as he explained would have given him the real value of the job, "the estimate would have been the sum of \$4,018.18, but I made a contract for \$3,165.00. That the value of each item that I did would be the proportion that I estimated it based upon the proportion of \$3,165.00 to \$4,018.18." Upon this testimony appellant says that he "can claim only 3165/4018 of the amount, or \$1,714." This contention is based upon what might have been and not on what was the fact. We cannot see that respondent's contract with Wright to complete the work agreed upon originally cuts any figure. When the abandonment occurred respondent had done certain work and furnished certain materials under his contract and, as was testified, "all of these materials were furnished to the building and actually used in the building, and that all the labor was used in preparing the materials and installing them in the building," and "that there were no materials on the ground at the time of the abandonment to his knowledge, and that none of the materials were hauled away after the abandonment." In this condition of the facts we think the finding of the court supported.

**THE BERGER MANUFACTURING COMPANY CLAIM.**

In alleging the value of the work which had been done, as stated in the first count, the complaint, it is claimed, omitted the element of proportion to the contract price, as also the amount paid; that the complaint alleged that, on July 12, 1909, the contractors "ceased the construction of the building or structure and never thereafter resumed the construction thereof," and there is no allegation of completion. But it was alleged that the lien was filed December 7, 1909, more than 120 days from the time of the cessation of labor as alleged. As to the second count in this complaint, it is claimed that there is no allegation of any fund as required by section 1200 of the Code of Civil Procedure.

These averments of the complaint as to the fund were not challenged for insufficiency. The facts as we have seen as to the cessation of labor, the taking over of the work by defendant soon thereafter, and the completion of the building are all hereinbefore pointed out and, as we understand the decisions, all the plaintiffs may have the benefit of them.

**THE VERMONT MARBLE COMPANY CLAIM.**

It is claimed that the first count of the complaint does not state a cause of action for the reasons urged to the complaint in the case of William Cronan. It is also objected to the second count of the complaint that it "does not allege that the lien contained a statement of the terms, time given, and conditions of the contract." The complaint states that the notice of lien was duly recorded, giving the page of record, and the lien was made part of the complaint and contained a full statement of the terms, time given, and conditions of the contract, and was received in evidence. It is true that the complaint does not set forth the terms, time given, and conditions of the contract, but it referred to the notice of lien, and alleged that it contained "a correct statement of the demand of plaintiff for said labor performed and said materials furnished after deducting all just credits and offsets" and, as remarked above, the lien was made part of the complaint.

Appellant relies upon *Davis v. Treacy*, 8 Cal. App. 395, [97 Pac. 78]. Very properly the court said in that case: "The complaint is at least unique." It was held insufficient, on

demurrer, to state a cause of action, because there was "absolutely nothing in the complaint to show what plaintiff's 'claim,' or 'lien,' as he styles it, filed with the recorder, contained, save the description of the property sought to be charged, or that it contained anything save such description." It does not appear that the lien was made part of the complaint and, as the court said, it "utterly fails to show a compliance with the provisions of section 1187, C. C. P., and for this reason fails to set forth a cause of action for the foreclosure of a mechanic's or laborer's lien."

In the present case there was no demurrer to the complaint. The only objection to the lien as evidence was that there was a material variance between the lien pleaded and that the lien was filed too late, both of which objections were properly overruled. It is very certain that no prejudice accrued to defendant from the alleged omission of allegations in the complaint, and on the evidence but one judgment could have been rendered. We think section 475 of the Code of Civil Procedure framed in accordance with section 4½, article VI, of the constitution should apply in this case. (See *Vallejo & Northern E. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238].)

As to the claims of J. P. M. Phillips and Bay Development Company the objections have been considered in other cases.

Finally, the claim of the San Francisco Teaming Company is attacked: First, because the complaint does not contain any allegation of abandonment. This objection has been previously noticed, and it was shown that other complaints contained ample allegations as to the fact as well also the answers and, besides, the findings are clear upon the point. Second, it is urged that the lien does not state the terms, time given, or conditions of the contract as shown by the contract, and there is a material variance between the lien and the evidence. (Citing *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 713, [118 Pac. 103, 113].) The lien states that Condon-McGlynn Company "entered into a contract on or about the 1st day of December, 1908, for labor as aforesaid, sand and material for said building with said San Francisco Teaming Company, the claimant herein, by which said labor, sand and material were furnished and the following is a statement of the terms, time given and con-



ditions of said contract, to wit: Said claimant agreed to furnish certain labor, sand and material for said building; that said labor, sand and material were to be paid for in cash upon demand at any time after said labor had been performed and at any time after said sand and material had been delivered; that said sand and material were delivered," etc.; "that the total amount of the claim of San Francisco Teaming Company for sand, labor and material furnished as aforesaid is \$631.12; that \$300.00 has been paid on account thereof and that the sum of \$331.12 is still due, owing," etc. The lien contained no statement as to the price to be paid for the sand or materials except as above. The points made are: (1) That the evidence showed an agreement for sand at one dollar per load, and teams at the ruling market rate, and hence the lien does not contain a statement of the terms of the contract; (2) the variance between the allegations of the lien and the evidence is a material one.

Witness Donaldson, respondent's bookkeeper, testified that there was an agreement to "supply them with sand at one dollar a load; teams at the running rate that was in existence at that time." Later in his testimony he corrected the above statement and testified that he knew of no specific price agreed upon; that most of the details were handled through him, but that he had no recollection of the price being mentioned. The substance of this witness' testimony was that the contractors verbally as needed ordered teams and sand and charges were made "at the running rates"—the "ordinary market running rate." Witness Condon, one of the contractors, testified that he did not remember that there was a written contract with respondent but that the understanding was verbal; the sand was to be delivered "at so much a load depending on the haul, the minimum would be one dollar a load"; that there was no particular agreement as to the price the teams were to be paid; that the day after hauling a statement would be made and if the price "showed too high a price, it was sent back for correction"; the price payable for sand depended upon the distance it was hauled and the teams were to be paid "the current rate" and "a dollar a yard for hauling the sand a reasonable distance." The bills from time to time were made out, as we understand the testimony, "at the running rates" for the sand and team-



ing, amounting to \$631.12, of which three hundred dollars was paid, leaving a balance of \$331.12. We think it fairly inferable from the testimony that the contract, such as existed, was an implied one, and that payment was to be made upon the performance of the labor or delivery of the sand, and both were to be paid at "the going rates" which the testimony established. The real question, then, is—Is the notice of lien fatally defective in not stating the terms of payment or price at which the labor was to be done and the sand to be furnished? As the facts appear, the price could not have been stated, since no price was agreed upon. The contractors simply gave orders for the teams and sand as required, and the obligation on their part was such as the law would imply. Such an implied obligation would clearly arise to pay on delivery or performance by respondent, and it would seem to us that there would also arise an implied obligation to pay the current or going rates for the labor or materials thus furnished.

In the case of *Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 726, [127 Pac. 805], it appeared "in some instances that no price was agreed upon," but as it appeared that the price was the reasonable value, the omission was held not to be fatal. There is in the present case no direct and specific statement that the price was reasonable, but we think when labor is done or materials furnished at the current or going rates, or, in other words, the market rates, it may be assumed that they were reasonable in absence of any evidence to the contrary.

Section 1187 of the Code of Civil Procedure requires of the lienor that he make a statement in the notice "of the terms, time given and conditions of his contract." The notice gave the terms as cash and, as to the time, payment was to be on delivery of the materials or performance of the labor. Full and literal compliance with the statute would have required a statement that the price to be paid was the current or market rate at the time for the labor and materials. But as in fact this is what was claimed, and what was understood by the parties, and would be implied as the contract in the absence of a specific agreement otherwise, we are unwilling to hold that the omission in the notice was fatal to its validity. (*Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, [111 Pac. 760].)

The lien adjudged in favor of the Santa Cruz Portland Cement Company for the sum of \$2,760.80 should be reduced by the sum of \$275.31; otherwise, the judgment is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 30, 1916.

---

[Civ. No. 1869. First Appellate District.—May 1, 1916.]

**FEDERAL CONSTRUCTION COMPANY (a Corporation),**  
 Petitioner, v. **ERIC WOLD**, as Superintendent of Streets,  
 etc., Respondent.

**STREET LAW—PURCHASE OF PROPERTY FOR DELINQUENT ASSESSMENTS BY MUNICIPALITIES—CONSTITUTIONALITY OF IMPROVEMENT BOND ACT OF 1915.**—The provision of the Improvement Bond Act, approved June 11, 1915, that a municipality, in the absence of any other purchasers, must purchase all property offered at delinquent sales for the nonpayment of street assessments, is not within the inhibition of section 18 of article XI of the constitution, which prohibits a municipality from incurring any liability not to be satisfied during the current fiscal year in which the same is incurred without support of a two-thirds vote of the electorate.

**ID.—CONSTITUTIONAL LAW—INCURRING OF LIABILITIES BY MUNICIPALITIES—APPLICABILITY OF PROVISION.**—The provision of section 18 of article XI of the constitution limiting the incurring of liabilities by municipalities only refers to acts or contracts of municipalities, and not to liabilities which the law places upon them.

**ID.—NOTICE INVITING PROPOSALS—OMISSION TO RECITE ALTERNATIVE OF BOND—VALID CONTRACT.**—A contract awarded for the doing of street work under the Improvement Act of 1911 is not void, because of the fact that the notice inviting proposals omitted to recite that the alternative of a bond for an amount not less than ten per cent of the aggregate of the proposal should accompany such proposal, where the resolution of intention provided that either a certified check in such amount, or a bond for such amount, should accompany the proposals.

**APPLICATION for a Writ of Mandate** originally made to the District Court of Appeal for the First Appellate District to compel the execution of a contract for street work.

The facts are stated in the opinion of the court.

**Morrison, Dunne & Brobeck, and Kirkbride & Gordon, for Petitioner.**

**Heller, Powers & Ehrman, and John F. Davis, for Respondent.**

**THE COURT.**—This is an application for a writ of mandate directed to the superintendent of streets of the city of Burlingame.

The petitioner is the contractor to whom was awarded the contract for the doing of certain street and other work in said city under the Improvement Act of 1911 (Stats. 1911, p. 730, approved April 7, 1911), and the Improvement Bond Act of 1915 (Stats. 1915, p. 1441, approved June 11, 1915). It is sought to obtain the order of this court that the respondent should enter into the contract with the petitioner for the doing of said work. The respondent has declined to sign said contract upon the ground, amongst others, that said Bond Act is unconstitutional, and upon the grounds of certain alleged irregularities in the proceedings leading up to the award of the contract.

With reference to the constitutional point, it appears that the Bond Act of 1915 provides that the municipality, in the absence of any other purchasers, must purchase all property offered at delinquent sales for the nonpayment of street assessments. It is contended that such a provision is in effect an incurring of liability not to be satisfied during the current fiscal year in which the same is incurred, and not supported by a two-thirds vote of the electorate, and hence violative of section 18 of article XI of the state constitution. This objection, if tenable, merely would render the provision requiring the municipality to purchase property offered at delinquent sales unconstitutional. It would not affect the validity of the balance of the act. However, it has been held that this section of the constitution only refers to the acts or contracts of a municipality, and not to liabilities which the law places upon municipalities (*Lewis v. Widber*, 99 Cal. 412,

[33 Pac. 1128]; *Welch v. Strother*, 74 Cal. 413, [16 Pac. 22]; *Cashin v. Dunn*, 58 Cal. 581).

Furthermore, it appears that under section 11 of this so-called Bond Act of 1915, a municipality can escape the responsibility for the purchase of property by the action of its council in providing for the collection of delinquent assessments by foreclosure suits. The liability, therefore, is in effect contingent upon the future acts of the municipality, and would not be within the constitutional restriction.

It is further contended that the resolution of intention was never published, for the reason that certain work is called for to be done upon a street named Cabrillo Avenue under the original resolution of intention and the plans and specifications, whereas, as published, the resolution called for work to be done upon Drake Avenue, a parallel street.

The particular work in question, however, was of a very minor nature compared to the aggregate of work called for, and it was otherwise properly described. In the resolution of intention the plans and specifications are referred to and made a part of the same, so that a property owner, upon examining the plans and specifications, original resolution of intention, and published resolution of intention was fully informed of the work proposed to be done.

A further ground of invalidity urged by the respondent is a defect in the notice given by the clerk of the city council inviting bids for doing the work. The statute provides that proposals shall be accompanied by a certified check or bond for an amount which shall not be less than ten per cent of the aggregate of the proposal (Improvement Act of 1911, sec. 10, Stats. 1911, p. 730). The resolution of the board of trustees conformed in all respects to the law; but the clerk, in the notice inviting proposals, called for a certified check in said amount, but failed to mention the alternative of a bond for said amount. The statute, however, does not require any recital in the clerk's notice with reference either to the certified check or bond. The act of the clerk was unauthorized, and, therefore, will be disregarded, and the notice which was authorized by the board of trustees be alone considered (*Belser v. Allman*, 134 Cal. 399, 402, [66 Pac. 492]).

It is also contended that no sufficient grades were established; but it appeared that proper resolutions fixing the

grades had been passed, in which certain elevations were stated, which elevations were referred to a pin in the cement curb in front of the Bank of Burlingame building, the elevation of which is 32.293 feet. It is contended that this does not show whether or not said pin or reference point is above or below any established datum or base, and, therefore, is indefinite. It is a matter of common knowledge, however, that elevations in this part of the state are commonly referred to height above sea level; and any engineer would, therefore, be able to determine the proper elevations fixed by the resolutions passed by the board.

The other points urged by the respondent do not seem to be worthy of especial consideration.

A peremptory writ of mandate will, therefore, issue forthwith in conformity with the prayer of the petition on file.

---

[Civ. No. 1479. Third Appellate District.—May 2, 1916.]

**CLAUS A. SPRECKELS et al., Respondents, v. STATE OF CALIFORNIA, Appellant.**

**INHERITANCE TAX LAW—TRANSFERS IN CONTEMPLATION OF DEATH—POSSESSION OR ENJOYMENT AFTER DEATH—QUESTIONS OF FACT.**—Under the Inheritance Tax Law of 1905 (Stats. 1905, p. 341), whether transfers of property are made "in contemplation of death," or "intended to take effect in possession or enjoyment after the death" of the donor, are questions of fact.

**ID.—MEANING OF PHRASE "IN CONTEMPLATION OF DEATH."**—The phrase "in contemplation of death," as used in the Inheritance Tax Law, relates to transfers made when contemplation of death is the motive which prompts the transfer, and does not have reference to that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life.

**ID.—GIFTS OF CORPORATE STOCK BY MOTHER TO CHILDREN—EVIDENCE—TRANSFER NOT IN CONTEMPLATION OF DEATH.**—Under the Inheritance Tax Law gifts of corporate stock made by a mother to her children at a time when she was of the age of seventy-nine years, and suffering from a serious and dangerous heart affliction which caused her death a few weeks after the making of such gifts, are not made "in contemplation of death," and therefore not subject to taxation, where it appears that the donor had often declared her

intention of giving the property to the donees *in her lifetime*, and that she at the time of such gifts harbored no thought of immediate death.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Hartley F. Peart, Robert A. Waring, U. S. Webb, Attorney-General, and Albert H. Elliot, for Appellant.

Cushing & Cushing, for Respondents.

**HART, J.**—Shortly prior to her death, Anna C. Spreckels, the mother of the plaintiffs, made to the latter gifts of certain corporate stock. The defendant claimed, as it still claims, that the gifts were made in contemplation of the death of the donor and to take effect after that event and that, therefore, the transfers were and are subject to taxation under and by virtue of the provisions of the statute known as the Inheritance Tax Law.

This action was instituted by the plaintiffs for the purpose of obtaining a decree quieting their title to the property involved in the said transfer as against the said claim of the defendant.

Findings and judgment were in favor of the plaintiffs, and the appeal here is by the defendant from said judgment.

On the twenty-sixth day of December, 1908, Claus Spreckels, a California pioneer and a San Francisco citizen of note and enormous wealth, died testate, in the city of San Francisco, leaving a vast amount of real and personal property, moneys, mortgages, and bonds. Surviving him were his widow, Anna C. Spreckels, and five children, among the latter the plaintiffs herein, all said children being the issue of said deceased and said Anna C. Spreckels. The entire estate left by the deceased belonged to the community.

On the thirty-first day of July, 1909, articles of incorporation of a corporation designated and named "San Christina Investment Company" were filed in the office of the county clerk of the city and county of San Francisco, Mrs. Spreckels having caused the said corporation to be organized under

and by virtue of the laws of the state of California. The general purposes of said corporation, as the same are stated in its articles, were to acquire, sell, and deal generally in real estate, to build upon and otherwise improve the same, and to carry on and do all things necessary for the profitable management of said properties for any purpose or purposes to which they might be put, and to buy, sell, pledge and generally deal in stock, bonds, and obligations of corporations, public or private, "and personal property of any kind." The special motive prompting Mrs. Spreckels to organize said corporation was to employ it as an instrumentality for properly conserving, handling, and managing with profit her vast and varied property interests, and to transfer all said interests in the form of stock to the plaintiffs herein.

On the fourteenth day of September, 1909, in pursuance of a petition previously filed therefor, the superior court of the city and county of San Francisco, sitting in probate, made and entered its decree of partial distribution of the estate of the said Claus Spreckels, deceased, whereby it distributed to the widow, Anna C. Spreckels, her community share thereof.

On the eighth day of November, 1909, "said Anna C. Spreckels made, executed and delivered to said San Christina Investment Company a deed wherein and whereby she conveyed to said corporation all the real property so distributed to her by said decree of partial distribution, and other real property situate in the state of California, but no personal property whatsoever. . . . That thereafter, to wit, the 19th day of January, 1910, said Anna C. Spreckels transferred and conveyed to said San Christina Investment Company certain personal property situate within the state of California, being part of the personal property distributed to her under said decree of partial distribution aforesaid, and other personal property. That said deed so delivered on November 8th, 1909, was delivered to said San Christina Investment Company in consideration of thirty-five thousand (35,000) shares of the capital stock of said corporation then issued to Anna C. Spreckels therefor, and said transfer and conveyance of January 19, 1910, was made to said corporation in consideration of fourteen thousand nine hundred ninety-seven (14,997) shares of the capital stock of said corporation then issued to said Anna C. Spreckels. That except as in this paragraph of these findings set forth, no conveyance or transfer of real or per-

sonal property was at any time made by said Anna C. Spreckels to said San Christina Investment Company; that thereafter and on the 20th day of January, 1910, said Anna C. Spreckels delivered all of said shares of stock of said San Christina Investment Company so received by her as in these findings set forth, except three (3) shares thereof, to these plaintiffs as a gift, all as set forth in paragraph II of these findings. That said shares so given to plaintiffs are not and were not all the issued shares of said corporation, but are and were all of said issued shares except six (6) other shares, and were at the time of said gift evidenced by a single certificate of said corporation issued to said Anna C. Spreckels on the 19th day of January, 1910, for said forty-nine thousand nine hundred ninety-four (49,994) shares, the same being a portion of the shares issued to said Anna C. Spreckels as aforesaid, and being the same shares referred to in paragraph II of these findings."

On the fifteenth day of February, 1910—less than one month after making the gifts in question—Mrs. Spreckels passed away. She was then a few months beyond the age of seventy-nine years. For many years prior to her death she had suffered from chronic heart trouble, technically called "myocardiac disease."

The answer alleges, upon information and belief, that Mrs. Spreckels filed the petition for partial distribution of the estate of her deceased husband, Claus Spreckels, and so sought and obtained a decree of partial distribution of said estate to be made to her, and thereafter transferred all her properties to the San Christina Investment Company, and thereupon "caused certificates for the capital stock thereof to be issued and delivered to the plaintiffs herein as hereinbefore alleged in contemplation of her death and that the said conveyances and transfers were intended to take effect in possession and enjoyment as to the grantees and transferees therein named, the plaintiffs herein, after her death."

As before indicated, the defendant's claim of right to the payment of a tax upon the properties involved in the gifts above described is based upon section 1 of the statute passed by the legislature of 1905 (Stats. 1905, p. 341), commonly known and referred to as the "Inheritance Tax Law."

So much of said section 1 of the Inheritance Tax Law as is material to the solution of the ultimate question presented by

this appeal reads: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, . . . shall be and is subject to a tax. . . ."

The court found as follows: "That said Anna C. Spreckels did not cause said petition for partial distribution of the assets of the estate of said Claus Spreckels, deceased, to be made and filed, or made, or filed, in her behalf, or said decree or partial distribution thereof to be made to her, or make, execute and deliver, or make, or execute, or deliver said deed to said San Christina Investment Company, or transfer or convey said personal property or any part thereof to said last named company, or cause said certificates of capital stock therein, or any certificate of capital stock, or any share of capital stock in said San Christina Investment Company, to be issued and delivered, or issued, or delivered, to plaintiffs herein or any thereof, or at all, in contemplation of her death, and neither the said acts aforesaid nor any thereof were made or done by her in contemplation of her death."

The court further found that the transfers above referred to were not, nor any thereof, intended to take effect in possession and enjoyment or in possession or enjoyment, as to the grantees or transferees therein named (the plaintiffs herein) or either or any thereof, after the death of Mrs. Spreckels, "but each and all of said conveyances, transfers and said gifts were intended to and did take effect in all and every respect and for every purpose, immediately upon the making thereof, respectively and prior to her death."

It is also found that six shares of stock in the said investment company were given and transferred by Mrs. Spreckels to other persons or corporations, but were not so given and transferred in contemplation of her death, nor the enjoyment and possession of the same intended to be or were postponed until after her death, but that the gift and transfer of said six shares was absolute, and that the transferees thereof, as



was true of the plaintiffs with respect to the above-mentioned gifts and transfers to them, immediately and prior to the death of Mrs. Anna C. Spreckels entered into the possession and enjoyment of said property in each and every respect and for every purpose.

It is obvious that the *punctum saliens* of this controversy is whether the gifts of Mrs. Spreckels to the plaintiffs were made in contemplation of her death within the meaning of the legislative intent of the above section, or made with the intention that they were to take effect in possession or enjoyment after such death; and it is equally obvious that the questions whether the gifts herein in controversy were made by the donor "in contemplation of death," within the meaning of the law, and such transfers were "intended to take effect in possession or enjoyment after the death" of the donor, are those of fact. (*Estate of Reynolds*, 169 Cal. 600, 603, [147 Pac. 268, 270]; *People v. Kelley*, 218 Ill. 509, [75 N. E. 1038, 1039]; *In re Benton*, 234 Ill. 366, [14 Ann. Cas. 107, 18 L. R. A. (N. S.) 458, 84 N. E. 1026]; *Matter of Thorne*, 162 N. Y. 238, [56 N. E. 625].) It is, therefore, readily to be perceived that the solution of the ultimate proposition submitted by this appeal must depend upon whether there is evidence in the record which affords sufficient support to the findings above quoted and referred to.

There is no ground or reason arising in the evidence for doubting that Mrs. Spreckels intended that the gifts or transfers in question were to take effect immediately upon the execution thereof, that the donees were to enter into immediate possession and enjoyment of the properties or stock so transferred and before her death, and that said donees (the plaintiffs) did, immediately upon the execution of the gifts and before the death of Mrs. Spreckels, enter into the possession and enjoyment of said properties. Indeed, the evidence upon this phase of the controversy stands in the record undisputed, and, therefore, so far as this record is concerned, is conclusive upon that point. It follows that the only question here is whether the gifts were made in contemplation of the death of the donor within the true intent and contemplation of the statute.

We are convinced that the finding that the gifts in controversy were not so made is sufficiently fortified by the evi-

dence to preclude any just interference therewith by this court.

First, it will be well to inquire into the legislative meaning and scope of the language, "in contemplation of death," as that phrase is used in the statute. It certainly cannot justly be held that the purpose or the intention of the legislature was, by the law in question, to subject every transfer of property by gift to the burden of the inheritance tax. Obviously (in other words), the language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and the physically robust as well as in the aged and the infirm. No similar statute has been so construed. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden. Or, as counsel for the respondents with singular aptness states the proposition: "It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax." That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer. Or, as the proposition is perhaps the more lucidly explained as follows in Ross on Inheritance Taxation, section 117, referring to the words, "in contemplation of death," as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax. "They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril."

Again, in Andrews on the Transfer Tax Law of New York, page 172, it is said: "The statute was evidently intended to reach absolute transfers of property when made under certain conditions, viz., when the transferor was contemplating death. That is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his prop-



erty and the business is transacted while contemplating death and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer; . . . but if made with other motives and for other causes it is not taxable no matter when made, as it cannot be presumed that the legislature intended to place any limitation upon the inherent right of a person to give away his property whenever, and to whomsoever, he desires."

The views thus expressed upon the meaning of the words referred to are in harmony with those to be found in all the cases. (See *State v. Pabst*, 139 Wis. 561, [121 N. W. 351]; *Rosenthal v. People*, 211 Ill. 309, [71 N. E. 1122]; *People v. Burkhalter*, 247 Ill. 600, [139 Am. St. Rep. 351, 93 N. E. 379]; *In re Dessert's Estate*, 154 Wis. 320, [Ann. Cas. 1915B, 1084, 46 L. R. A. (N. S.) 790, 142 N. W. 647].) And, as we understand the case of *Estate of Reynolds*, 169 Cal. 600, 603, [147 Pac. 268, 270], there is no expression therein with which the views above expressed conflict. In that case, Mr. Justice Henshaw criticises the construction put upon a similar statute of the state of New York by the courts of that state, it having at first been held by those courts that a transfer of property "in contemplation of death" within the meaning of the Inheritance Tax Law of said state meant a gift *causa mortis*, and that the law was "applicable to no other kinds or characters of transfers." Judge Henshaw, referring to the New York decisions, said in the Reynolds case: "Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions may not be evaded." The Reynolds case was decided in the year 1912 after the legislature of 1911 had, among other changes, added the following provision to our Inheritance Tax Law: "The words 'contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of a will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or

intestate laws." This amendment, as was said of it in the Reynolds case, in no manner changed the law as it stood prior thereto, but its purpose and effect were merely to give a clearer expression to the legislative intent and meaning of the law, or to make certain that which might otherwise have been regarded as doubtful, viz., that the intent of the legislature was to subject to the tax all property transferred as a testamentary disposal thereof, whether such transfer was by gift *inter vivos* or by will and testament.

With the law as we understand it thus stated, we will now take up a consideration of the evidence. In addition to the facts already narrated, the testimony shows: That Mrs. Spreckels, immediately after the death of her husband, Claus Spreckels, in the month of December, 1908, was awarded a family allowance of five thousand dollars per month payable out of the estate of her deceased spouse. In addition to this sum, she received out of the income of her husband's community share of the estate, in accordance with the terms of his last will, the sum of ten thousand dollars per month, the aggregate amount of her monthly income being, obviously, the sum of fifteen thousand dollars.

Claus A. Spreckels, one of the plaintiffs herein, testified that, shortly after his father's death, his mother, Anna C. Spreckels, talked with him about forming a corporation as an instrumentality for handling her enormous properties and business interests. The organization of such a corporation for such purpose, testified the witness, wholly originated in the mind of Mrs. Spreckels herself, and without any suggestion from him regarding the proposition. Thereafter, Mrs. Spreckels frequently brought the matter up in conversation with the witness and appeared to be insistent in her intention to form a corporation for the purpose indicated. She said to the witness, long before the transfer, that she was receiving, with the family allowance and the amount coming to her monthly from her deceased husband's interests, an enormous sum—in fact, a much larger sum than she could ever use—and that it was her desire and intention at that time (she said) to distribute part of her belongings to her three children, the plaintiffs. These conversations occurred in the year 1909, at which time Mrs. Spreckels was about seventy-seven years of age. The witness proceeded to say that at no time in any of the conversations referred to did Mrs. Spreckels speak

about dying or preparing for death. On the contrary (continued the witness), she frequently spoke of refurnishing her Van Ness Avenue residence, which had been damaged to some extent by the 1906 fire, and which damage she had, early in the year 1909, caused to be repaired, with the purpose of again occupying it as her permanent home. She stated in said conversations, and in conversations had just prior to and at about the time of the transfers in question, that she intended going to Europe for the purpose of obtaining suitable furnishings for her Van Ness Avenue residence and at the same time paying a visit to her daughter, Mrs. Ferris (one of the plaintiffs herein), who was then a resident of London. The witness declared that on no occasion, when speaking of organizing the San Christina Investment Company, and of giving certain of her interests to the plaintiffs, did Mrs. Spreckels say or intimate that her purpose in forming the corporation and then transferring her property to her three children was to avoid probate proceedings. She merely said on all occasions that her intention was to transfer her interests to said three children, they to take immediate possession thereof upon the consummation of the transfer.

Referring to the general state of Mrs. Spreckels' health during the year 1909, the witness said that at times she would be ill, while at other times she appeared to be in the enjoyment of fairly good health. The opinion of the witness was that her death was due to the ravages of old age and a general breaking-down of her physical organization.

Rudolph Spreckels, a plaintiff herein, corroborated the testimony of Claus A. Spreckels in all substantial particulars. He declared that the purpose of his mother, Mrs. Anna Spreckels, as expressed by her, in forming the San Christina Investment Company was to transfer all her property to said company and then give said property or the stock of said corporation to the three children, the plaintiffs. She declared to the witness that she desired that said three children should receive from her said property "so that the same might be used and enjoyed by them during her lifetime." The witness continued: "My mother at that time was receiving a substantial income from my father's estate as a family allowance by the court. She had no other source of income. She owned the Van Ness avenue house individually and also owned a piece of property in the Hawaiian Islands. The property

on Van Ness avenue and that in the Hawaiian Islands were residence properties and were not income producing. Under the trust clause of my father's will and from a family allowance my mother was in receipt of approximately \$15,000.00 a month. My mother did not express any desire in her conversations with me in reference to her property to avoid the cost and delays of probate, nor did she offer any opinion in reference to attorneys and attorneys' fees. Q. Did she give any reason at all other than her wish to have you three children enjoy the fruits of this property? A. That was the entire purpose of it; I think I can say that definitely, that it was her intention at the very beginning, that this was to come to the children."

The witness testified that in all his conversations with his mother relative to her property affairs, and the transfer of the same to the plaintiffs, she never referred to her death until about three days prior to the date of that event. On that occasion, she said to the witness, "Well, I wonder when I will be able to get up again, or if I will get up." The witness declared that Mrs. Spreckels first became ill so that she needed the care of a physician in the month of April following the death of her husband. "I recollect that she went to Aptos (Santa Cruz county) in the summer of 1909. I visited her there on two occasions. Up to the time that my mother was taken ill after my father's death, she had always enjoyed good health. She had a strong constitution. She had been very active for her years, exceedingly so. . . . Dr. Baum succeeded Dr. Richter as the physician for my mother during her illness. I had not known Dr. Baum until that time. The change was made, I think, at the instance of my mother. She was a little impatient that she wasn't able to get out, as she was a woman who had always enjoyed good health and had a good constitution, and she thought that perhaps under other treatment she could get out more rapidly. She was restive under the doctor's treatment. Q. Did she ever express herself in that way, that she wanted to get out more rapidly? A. Yes, sir, she felt that she wanted to have more freedom of action. She didn't enjoy the diet, or matters of that sort. Q. She expected to go out? A. She did, most decidedly. She anticipated, of course, going abroad. She was exceedingly anxious to be with my sister at the time of the birth of her child, which was expected in June (1910) and did

actually occur on June 28th, I think; my sister's first and only child; and, of course, she was particularly anxious to be with her daughter under those circumstances. She had repeatedly spoken to me on that subject. My sister expected my mother to be with her because she left, I think, some time in January—probably within a month prior to my mother's death. Of course, that was not anticipated."

Charles S. Cushing, the attorney who prepared Mrs. Spreckels' will, and who prepared the papers and initiated and completed the necessary legal steps for the formation of the San Christina Investment Company, testified, in part: "At the time the stock in question was transferred to the plaintiffs here I was a witness to the indorsement. I had a talk with Mrs. Spreckels as her attorney in reference to this transfer. She expressed no other reasons at that time for transferring the stock other than is substantially shown on the back of the certificate. She said she wanted to give it to her three children. She certainly did not mention at that time her desire to avoid the expense of probate and she did not mention anything in connection with her own death. Nor did she mention anything regarding the avoidance of a will or anything of that kind."

Anna C. Brommer, a niece of Mrs. Spreckels, had lived with the latter and was continually her companion and confidante as to her private affairs for a period of about fourteen years down and prior to the time of Mrs. Spreckels' death. This witness testified that Mrs. Spreckels often discussed her business affairs with her (the witness), and had frequently, after the death of her husband, spoken of forming a corporation to which she intended to transfer the bulk, if not all, of her property. "I cannot recall," said Miss Brommer, "the first conversation I had with her about giving her property to her three children. I could not distinguish one conversation from another. The substance of these various conversations by Mrs. Spreckels was that she had ample means for herself and that she wished her three children to have this stock, and that she wanted to give this to them share and share alike. . . . She never stated to me as a reason for making this transfer that she wanted to avoid any possibility of contest or probate expense or anything of that kind. I knew that Mrs. Spreckels was repairing the family residence on Van Ness avenue. I assisted her in the ideas in fixing it over.

It was her intention to take up her residence in that mansion. Her idea of going to Europe was to purchase the furnishings for the house. She spoke to me about that. She told me that she intended to move over to the Van Ness avenue house as soon as it was completed. She thought of going to Europe first and then in the spring of 1910 it might be completed. She intended to go to Europe in the spring of 1910. She did not say how long she expected to stay in Europe, but expected to be with her daughter in June, and then expected to come back and take up her residence at the Van Ness avenue property. . . . Her conversations with me about her affairs were rather intimate. . . . She did not suggest that a better way of disposing of property was by deed or stock; nor did she suggest anything about avoiding probate. She never expressed herself as to lawyers and lawyers' fees. The day she transferred the stock in question she seemed more cheerful than at any other time during her illness. That would extend over the year 1909. . . . The day of the transfer of the stock in question Mrs. Spreckels came downstairs. We had a good dinner that night. She was very cheerful that day. During 1909 Mrs. Spreckels would almost every day come into the sitting room which was the next room to her bedroom and sit in there. There were periods though for probably a week or ten days at a time when she remained in bed. The periods in which she remained in bed occurred more frequently in the early part of 1909. She became ill in April, 1909, and in June, 1909, she was very much better and went down to the country for two or three months, and seemed quite well, and then she was not so well about December. She had a relapse probably a week or so after January 20, 1910, and was confined to her bed. . . . Mrs. Ferris (one of the plaintiffs) was here in the latter part of 1909. She lives in England and returned there. She became the mother of a daughter there in June, 1910. That was one of the reasons why Mrs. Spreckels thought of going to Europe."

Dr. C. M. Richter, Mrs. Spreckels' physician, testified that he professionally attended her at various times from the middle of April, 1909, until the tenth day of January, 1910. Mrs. Spreckels was suffering from myocarditis, a chronic inflammation of the muscular valves of the heart, the effect of which was that "she had very irregular action of the heart

and short breath, and weak feeling, troubles of circulation in all parts of the body." The doctor stated that when he was first called in to see Mrs. Spreckels "she had apparently had that trouble for some time before—perhaps for years. . . . During the period I attended Mrs. Spreckels she was not confined to her bed from this illness. . . . Probably from the middle of April to the middle of June, 1909, I visited her almost daily and then she went to the country until about the middle of August, and from that time on I saw her more regularly until December and January I saw her every day. There was really no material difference in her condition in December, 1909, and January, 1910, as compared with her condition in April, 1909. It was approximately the same. . . . The treatment I prescribed was principally rest and some heart medicine and some diet. I advised a trip to the country, which she took, but her condition was not materially improved by reason of this trip. I knew that she was contemplating a trip to Europe. I often spoke to her about it and I told her she might make such a trip in the summer of 1910 without much trouble, just as she had gone to Aptos. . . . During this time she was in a condition so that she could go about the house from one room to another. She had to avoid any prolonged physical strain because she was extremely heavy in weight. She could walk some distance but she was careful about it." The doctor declared that, while such an affliction as that from which Mrs. Spreckels was suffering might suddenly terminate fatally at any time, still one with that disease might live many years and finally die from some other cause. "I did not see any reason whatever," he continued, "why she would not live for some time. . . . I should think she was in as good health on January 10, 1910, when I last saw her, as she had been during the previous months. . . . We discussed this European trip a number of times. I gave her no reason to believe that she could not take the trip. On the contrary, I advised her that she might safely take it. I saw no reason at the time I left her to anticipate a fatal termination of her illness in the immediate future and so far as I know she had no reason to anticipate such a result. Q. As I understand your answers to some of my questions, they were that a person suffering from this particular kind of illness would be liable to sudden death at any time, is that right? A. Not that it would be, but could be. Q. The fact that Mrs. Spreck-

els was of the age of about seventy-seven years at this time, and had suffered for many years from this illness, you would not say that those two conditions would make it probable that she could reasonably expect to die at most any time? A. No, I couldn't say that. It is our experience that such people may live for years." The doctor further stated that he did not attend Mrs. Spreckels in her last illness; a Dr. Baum, who had died prior to the time of the trial of this action, having professionally attended her then and up to the time of her death. (The record is silent as to the specific cause of her death, so far as the opinion of a physician is concerned.)

We have now stated in substance all the testimony necessary to be considered here which was presented at the trial.

Counsel for the appellant declare that no conflict arises in the testimony, but they insist, or, at any rate, the necessary effect of their position is, that the natural and, indeed, the only logical conclusion which may follow from the evidence is that Mrs. Spreckels transferred by gift the property in question in contemplation of her death, within the true sense of that language of the statute—that is to say, that the contemplation of her death was the direct and impelling motive for the transfer. In support of this position, it is pointed out that Mrs. Spreckels, at the time of the execution of the transfer, was a woman of venerable years, at best not far removed from the natural end of her life; that, for many years prior to and up to the time of the transfer, she had been a chronic sufferer from a serious and dangerous heart affliction, which was of a nature that from it her death might suddenly occur at any moment, a condition of which undoubtedly she possessed a keen realization; that, as a matter of fact, her death occurred within a few weeks after she made the transfer.

It may be conceded that the testimony thus referred to and emphasized by counsel for the appellant as supporting their theory of this case is reasonably susceptible of the inference which they vigorously contend naturally and logically follows therefrom, and if that testimony embraced all that had been submitted to the consideration of the trial court, we might, perhaps, be able or possibly required to hold that, as a matter of law, the finding that the transfers were not made in contemplation of her death, according to the true import of that language as it is used in the law, was not sus-



tained. But, as clearly appears from the above statement of the testimony, there is other testimony in the record which must be considered in determining the vital question presented. Briefly to recapitulate: Shortly after her husband's death, in 1908, Mrs. Spreckels expressed her intention of forming a corporation for the avowed object of transferring her property thereto. She had often declared her intention of giving her property to the plaintiffs, and to Mr. Rudolph Spreckels stated that her desire was that her children, the plaintiffs, should own and enjoy the property *in her lifetime*. These ideas seemed, at all times and long prior to the date of the transfers, to have constituted the central thoughts of her mind until their crystallization by the organization of the investment company, the immediate transfer of the greater part of her estate thereto and thereupon the transfer of the stock thereof to the plaintiffs. Under the circumstances, it was, without any thought of her own death, or without any view to preparation therefor, a most natural thing for her to do. At her then advanced age, having other means far more than necessary for her own maintenance for the remainder of her life, she doubtless conceived that she would, in her declining days, be the happier if relieved of the heavy burden and serious responsibilities which necessarily go with the control and management of vast and varied property interests, such as she was the owner and possessor of, and that, in obtaining release from these burdens, her happiness would be the more certainly assured by transferring her property to her children so that they might own and enjoy it in her own lifetime. While she was afflicted with a serious heart affection, and suffered intermittent spells of illness which temporarily confined her to her bed, it is evident that she did not, at any time prior to the date of the transfers, harbor the thought that her life was in immediate peril from her malady, or that she would not live for many years to come. This is shown by the fact that she was, in the year 1909, having her Van Ness Avenue mansion repaired preparatory to her own reoccupancy of it, and by the further fact that down to the very occasion on which she transferred the stock to the plaintiffs she discussed and was contemplating a trip to Europe, not alone for the purpose of visiting her daughter and being with her at the time of the latter's expected *ac-couchement*, in June, 1910, but with the further declared ob-

ject of purchasing appropriate furnishings for her Van Ness Avenue residence. Indeed, even during the period of her last illness, she indicated a belief that she would be restored, or, at any rate, appeared not to have relinquished hope for her recovery; for, addressing Rudolph Spreckels, she said: "I wonder when I will be able to get up again, or if I will get up." Then there is the testimony of Dr. Richter, for a long time the family physician, who said that, while the malady with which Mrs. Spreckels was afflicted might suddenly terminate fatally at any time, it would not necessarily so terminate, and that with it she might still live very many years, she being a woman naturally of strong and robust constitution. He further testified that he advised Mrs. Spreckels that she could safely take her contemplated European trip.

From the evidence thus briefly repeated, the inference is reasonable and logical that there was no thought of immediate death in Mrs. Spreckels' mind when she made the gifts in question, and that the direct and impelling motive for said transfers was not that of the contemplation of her death within the meaning of the law.

Admitting, then, as counsel for the appellant point out, that there is testimony from which the opposite inference is reasonably deducible, is this court, under such a state of the record, legally justified in holding that the court below should have drawn that inference and so found in favor of the defendant? Is it within the legal province of an appellate court in a case where, as here, either of two diametrically opposing inferences—one in favor of the appellant and the other in favor of the respondent—may justly and reasonably be drawn from the proofs, to say that, as a matter of law, the trial court should have found in favor of a particular party to the action, or, in this case, should have drawn that inference, of which the evidence may for the purposes of this discussion be conceded to be susceptible, which would have justified findings in favor of the appellant? The rule suggested by these questions is, it would seem, too well settled to require their restatement. We will, however, reproduce here the expressions of a few of the cases with regard to it.

In the case of *Reay v. Butler*, 95 Cal. 206, 214, [30 Pac. 208], it is said: "This court can rightfully set aside a finding for want of evidence only where there is no evidence to sup-

port it, or where the supporting evidence is so slight as to show abuse of discretion."

In *Dallman v. Frank*, 1 Cal. App. 541, [82 Pac. 564], per Mr. Justice Harrison: "The findings of a court, like the verdict of a jury, will be upheld in the appellate court if there is any evidence which, *by reasonable construction*, tends to support such findings; and in making its decision the trial court is at liberty to take into consideration, not only the testimony given at the trial, but also all inferences of fact which may be reasonably drawn from the facts established by such testimony. . . . Although the appellate court may be of the opinion that, on the evidence in the record, it would have reached a different conclusion, it is not for that reason authorized to set aside the findings of the trial court. If the evidence is such that reasonable men may reach different conclusions thereon the finding of the trial court must be sustained."

In *Huston v. Anderson*, 145 Cal. 320, [78 Pac. 626], Mr. Justice (now Chief Justice) Angellotti said: "The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the finding of the court below."

There are innumerable other California cases to the same effect.

Conceding, then, that the court below could have justly concluded from the evidence that Mrs. Spreckels made the transfers in question in contemplation of her death, within the purview of the Inheritance Tax Law, the rule stated and applied in the above cases has peculiar application to this case, since, as we have clearly shown, the evidence was such as to have reasonably warranted the conclusion arrived at therefrom by the trial court and which conclusion is evidenced by the findings upon which the judgment herein is planted. It is, therefore, plainly and clearly apparent that the findings here cannot, with legal propriety, be interfered with by this court.

The length of this opinion, due mainly, as will be observed, to the extended statement of the testimony which was conceived to be essential to a clear appreciation of the conclusion to which we have been led, as well as eminently proper because of the importance of the issue presented, forbids a review herein of the many cases cited by the appellant in support of the hypothesis upon which its learned counsel with singular

ability have attempted to overthrow the judgment. Indeed, we have not thought it necessary to review those cases, with whose reasoning and conclusions we perceive no occasion to quarrel; for, after all, each case arising under the statute in question, as to whose meaning and intent in the particular concerned here there can be found no ground for disputation, must rest upon its own peculiar facts, and the adjudicated cases can, as a rule, do little, if any, more than to illustrate the application of the law to the particular facts of particular cases.

For the reasons herein given, the judgment appealed from is affirmed.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 29, 1916.

---

[Civ. No. 1530. Third Appellate District.—May 3, 1916.]

B. F. GWYNN, Petitioner, v. C. D. MCKINLEY, as Auditor,  
etc., Respondent.

**JUSTICES OF PEACE—COMPENSATION IN COUNTIES OF THIRTY-FIRST CLASS  
—AMENDMENT TO COUNTY GOVERNMENT ACT — CORRECTION OF IN-  
ADVERTENT OMISSION OF PREVIOUS LEGISLATURE—CONSTITUTIONAL  
LAW—"COMPENSATION" NOT INCREASED.—**The amendment made by the legislature of 1915 to the County Government Act providing for the compensation of justices of the peace of counties of the thirty-first class (to which the county of Placer belongs), enacted to rectify the effect of an oversight of the legislature of 1913 to make any provision for the compensation of such judicial officers of counties of such class, does not involve an increase in the compensation of such officers within the meaning of section 9 of article XI of the constitution, as such enactment became necessary after the adoption of the amendment to section 15 of article VI of the constitution in 1911, whereby judicial officers were prohibited from reserving to their own use any fees or perquisites of office, which, prior to such amendment to the constitution, constituted their only source of compensation.



**ID.—COMPENSATION OF PUBLIC OFFICER — ACT PROVIDING FOR INADVERTENT OMISSION—COMPENSATION NOT “INCREASED.”**—An act whose purpose is merely to correct an inadvertence, and to provide for the compensation of a public officer where no compensation had theretofore existed, does not amount to an “increase” in compensation.

**APPLICATION** for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District, requiring a county auditor to draw his warrant in favor of petitioner for his compensation as justice of the peace.

The facts are stated in the opinion of the court.

Lee Gray, for Petitioner.

Meredith, Landis & Chester, for Respondent.

**HART, J.**—This is an original application to this court for a writ of *mandamus* requiring the respondent, as auditor of the county of Placer, to draw his warrant in favor of the petitioner for the salary or compensation of the latter as justice of the peace of township No. 3 of said county for the month of January, 1916.

The petition alleges that the petitioner is, and was, since the first day of January, 1915, the duly elected, qualified, and acting justice of the peace of said township; that the salary provided by law of said justice of the peace is nine hundred dollars per annum, payable in the same manner and out of the same funds as county officers are paid, and that the respondent, as auditor of said county, has refused to draw his warrant in favor of the petitioner for the said month of January, 1916, and still refuses so to do.

The respondent has demurred to the petition generally, and thus the question to be decided is raised.

It appears that the petitioner and all other justices of the peace of Placer County were elected to said offices at the general state election held in November, 1914, and entered upon the discharge of their duties as such justices on the first day of January, 1915, their terms of office being four years.

Prior and up to January 1, 1915, the compensation of justices of the peace in Placer County was by way of fees only. (Stats. 1907, p. 498; Stats. 1909, p. 382; Stats. 1911, pp. 207, 655.)

At an election held on October 11, 1911, the people adopted an amendment to the constitution proposed by the legislature of 1911 (Stats. 1911, p. 2161), whereby sections 1, 5, 11 and 15 of article VI of said instrument were changed in certain particulars. Section 15 as amended reads as follows: "No judicial officer, except court commissioners, shall receive to his own use any fees or perquisites of office; provided, that justices of the peace now holding office shall receive to their own use such fees as are now allowed by law during the terms for which they have been elected."

It will be observed that the operative effect of the said amendment was suspended as to the terms of the justices of the peace existing at the time of the adoption thereof—that is, section 15 as amended was not to apply to justices of the peace until after the expiration of the then existing terms of said officers or, in other words, its operation was suspended until January 1, 1915.

The legislature of 1913 (the first session of that body after the adoption of the above amendment to the constitution) made no provision in the County Government Act or otherwise for the compensation of justices of the peace of Placer County. The result was, obviously, that when the petitioner and all the other justices of the peace of said county took charge of their offices in January, 1915, there was no compensation allowed them by law in any form, and they were, therefore, required to perform the services demanded of them as such officers without pay or compensation.

The legislature of 1915 amended in a number of particulars the County Government Act in so far as it applies to counties of the thirty-first class to which Placer County belongs. (Stats. 1915, p. 323.) Section 13 of said act as so amended provides for the classification of townships in counties of the thirty-first class, according to population, for the purpose of fixing the compensation of justices of the peace of counties of said class according to their duties, and further provides that, for the purposes of such classification, the population of such townships shall be determined by the board of supervisors, such determination to be arrived at by multiplying by three the number of registered voters at the last general election next preceding the date of such determination. (Stats. 1915, p. 325.)

The section further provides: "Justices of the peace shall receive the following salaries: In townships of the first class, the sum of nine hundred dollars for the period beginning with the date upon which this act becomes effective and ending December 31, 1915, and thereafter a salary of nine hundred dollars per annum. . . . Such salaries shall be paid in the same manner and out of the same fund as the salaries of county officers are paid and shall be compensation in full for all services rendered. All fees received by justices of the peace shall be paid into the county treasury every month."

The County Government Act of 1915 was approved by the Governor on the third day of May, 1915. The legislature of that year adjourned on the ninth day of May, and hence said act, by virtue of the provision of the constitution reserving to the people the initiative and referendum powers, did not go into effect until ninety days after the date of the adjournment of said session of the legislature, or until the ninth day of August, 1915. (Stats. 1915, pp. 1655, 1656.)

While the provision as to the compensation to be paid to justices from the date upon which the act became effective until and for the remainder of the year 1915 is not involved in this controversy, since, so it is conceded by counsel, the justices of Placer County were paid and received the compensation so provided for, it is well to call special attention to that provision, inasmuch as it bears to some extent upon the question of the intention of the legislature as to the time at which the whole provision as to the compensation of such justices should have operative or practical effect.

The ground upon which the respondent refuses to draw his warrant in favor of the petitioner for the salary claimed by the latter by virtue of the amended County Government Act of 1915, is that the office of justice of the peace is a county office, and that the compensation provided for the incumbent of such office by the said act is, as to the terms of justices of the peace of counties of the thirty-first class existing at the time of the amendment prescribing such compensation, amounts to an increase of the compensation of a county officer after his election and during his term of office, contrary to the terms of article XI, section 9, of the constitution. The precise language of said section of the constitution is:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his

term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

The contention of the petitioner is: 1. That he is neither a county nor city or town or municipal officer, but that the office of justice of the peace is an integral part of the judicial system of the state, as established and contemplated by the constitution (art. VI, sec. 11), and that since article XI, section 9, of that instrument, above quoted, or any other section or provision of that instrument, does not expressly include justices of the peace within the scope of its inhibitions, it follows that the legislature is under no legal or constitutional interdiction so far as the increasing the compensation of justices of the peace is concerned. 2. That, conceding that justices of the peace are county officers, the provision for compensation of such officers where, as here, no compensation whatever had theretofore been provided for as to such officers, does not involve the increase of their compensation within the meaning of the section of the constitution above quoted herein.

We have reached the conclusion that the provision made by the legislature of 1915 for the compensation of justices of counties of the thirty-first class (the legislature having omitted previously to make such provision) does not involve an increase in the compensation of those officers within the contemplation of the constitutional inhibition against such increase. It will hence be unnecessary in this proceeding to consider the question whether justices of the peace are county officers and the matter of their compensation subject to the terms of the above section of the organic law.

It should be explained, however, that counsel appearing here as *amici curiae* represent the county of Lassen, which is of the fifty-second class, as counties have been classified by the legislature. By the brief of counsel so appearing here, it is disclosed that one Arnold had been elected a justice of the peace of township No. 1 of Lassen County at the general state election held in the month of November, 1914, and entered upon the discharge of his duties of said office on the first Monday in January, 1915. At the time of his election, his salary as such justice, as fixed by the legislature of 1913, was fifty dollars per month. (Stats. 1913, p. 1226.) The legislature of 1915, however, increased his compensation from fifty

dollars per month to one hundred dollars per month. (Stata. 1915, pp. 1379, 1380.)

Arnold, it is likewise made to appear, petitioned the superior court of Lassen County for a writ of mandate to compel the auditor of said county to draw a warrant in his (Arnold's) favor for the sum of one hundred dollars as for his salary for the month of August, 1915, his claim being that he was entitled to be paid for his services as justice according to the compensation prescribed for his office by the legislature of 1915. The learned court below held against his contention and denied the writ, the ground of the decision being that a justice of the peace is a county officer and, therefore, comes within the terms of article XI, section 9, of the constitution forbidding any act by the legislature increasing the compensation of county officers during the terms for which they had been elected.

Arnold has not initiated any proceeding authorizing a decision in his case by this court. As above stated, however, his attorney and the attorneys representing Lassen County, no doubt conceiving that the question upon the solution of which Arnold's case hinges, would arise and be considered and disposed of in the present proceeding, appeared herein to present the pivotal point involved in that case; but, as before declared, we find it unnecessary, in the determination of the issue presented by this proceeding, to consider and decide that point. And, since it is deemed to be unnecessary to do so, we prefer not to consider and decide in this proceeding the question whether a justice of the peace is a county officer within the meaning of article XI, section 9, of the constitution. The question has incidentally arisen in a number of cases decided by the supreme court, but that court has thus far not found it necessary to express an unqualified or a definitive judgment thereon.

The sole question, then, with which we are here concerned is, as before suggested, whether the act of providing compensation for justices of the peace in cases where the legislature had theretofore made no provision whatever for such compensation is tantamount to "increasing" the compensation of those officers, in violation of the constitutional restriction upon the legislature in that particular, assuming, of course, for the purposes of this decision, that justices of the peace are county officers.

That the legislature intended that the compensation provided for for the justices of the peace of counties of the thirty-first class by the amendment made at its session of 1915 to so much of the County Government Act as applies to counties of that class should be received by such justices in office at the time of the enactment of said amendment, is a proposition about which there can be no kind of doubt. If the amendment were otherwise obscure or uncertain in that regard, it is certainly made very clear by the special provision authorizing the payment of the compensation so prescribed to such justices immediately upon the law going into effect—that is, beginning with the ninth day of August, 1915, and for the remainder and until the expiration of that year. Of course, the legislative intent as to an act would become wholly without importance or significance if it should transpire that, by giving effect to such intent, the act would contravene some constitutional inhibition with regard to the subject matter thereof. For illustration (concretely): In the case of the law under consideration, although the legislature has evinced a clear intention that the law should have operative force the moment that it went into effect, still, if, by carrying out that intention, the justices of the peace affected thereby (assuming, for the purposes of the proposition, that they fall within the inhibition of section 9 of article XI of the constitution) would be allowed compensation in excess of the amount which they were allowed by law when the amendment was enacted, the intention of the legislature that said law should become operative or given practical operation immediately upon its going into effect would be violative of the constitutional mandate referred to and could not be sustained. But the provision in the amendment of the County Government Act for the payment of compensation to justices of the peace in Placer, and other counties of the thirty-first class, from the time the amendment was to go into effect, is significant in that it clearly, and, indeed, unquestionably, discloses that the controlling motive underlying the amendment as a whole was to rectify the effect of an oversight by the legislature of 1913 (the first session of that body after the adoption of section 15 of article VI of the constitution, whereby judicial officers are prohibited from receiving to their own use any fees or perquisites of office, which had theretofore constituted the only source as well as mode of compensation to those officers) to

make any provision for the compensation of those judicial officers of counties of the thirty-first class, with the obvious result that such officers were required, from the time of the operative effect upon them of said constitutional amendment, to render services as such officers without compensation or remuneration of any kind or character whatsoever. This having been, obviously, the sole legislative design in amending the County Government Act in 1915, in so far as that act applies to justices of the peace of counties of the thirty-first class, is it true that, in so attempting to correct so serious an inadvertence, the legislature ran up against the constitutional mandate against the *increasing* of the compensation of certain officers after their election or during their terms of office, conceding, but not deciding, that justices of the peace come within the category of officers mentioned by section 9 of article XI of the constitution? As above declared, we do not think so.

The object which the framers of the constitution of 1879 had in view, in incorporating into that instrument the said provision, has often been explained in the cases and is well and generally understood. In the constitution of 1849, which was superseded by our present organic law, there was no such restriction upon the legislature. The result was that under that instrument persons elected to county, town, and municipal offices were constantly appealing to the legislature to increase the compensation of the offices to which they had been elected during the terms for which they had been elected. The practice grew to be a most pernicious one. In almost all instances the legislative judgment with respect to such legislation was largely controlled, not by a consideration of whether the proposed increase of compensation was just to the taxpayers as well as to the office-holders, but by the personal influence and persistent importunity of the latter and their friends. The effect of this system was, as most naturally it would be, that certain officers of certain counties were awarded a larger amount of compensation for their services as such than was allowed to the officers of other counties performing like services both in character and extent. It was to impart some semblance of uniformity to the compensation allowed to county and other local officers, and to that end eliminate, in the consideration of legislation looking to an increase in such compensation, the element of "personal equation," which, as stated, was responsible for much of such legis-

lation under the old system, that the constitutional barricade against such legislation was adopted into the present organic law of California.

The constitutional provision in question is founded in good sense and justice, but it cannot justly be so construed as to prevent the legislature from supplying a manifest ellipsis in the law—to correct an obvious inadvertence whose result, if permitted to remain uncorrected, must be to hamper in no inconsiderable degree the proper administration of public affairs under a system established by the people themselves through their constitution. There is nothing in the constitution implying that persons performing public services shall not be compensated and adequately compensated therefor. On the contrary, that instrument contemplates that all public servants shall be justly compensated for their public services. The very provision in question so implies, as reasonably may it even be said of the provision which forbids the payment of judicial officers for their services as such in the form of fees required by the law to be paid to them for certain official acts. The constitution has, save in an exceptional instance or two, committed to the legislature the duty of making provision for such compensation, and where that body fails wholly to do its duty in that regard, it must be assumed that the omission has been due entirely to an oversight or inadvertence. To hold it to be true, then, that in such a case an act whose purpose is merely to correct the inadvertence and so provide for compensation—provide for something which theretofore had not existed—amounts to an “increase” of compensation within the import of the constitutional provision in question, would be to give to that provision a most unreasonable construction or a construction from which most unjust consequences would follow, where the legislature had failed to do its duty in that regard. But the provision referred to cannot in reason be given such a construction. Indeed, such a construction would amount to a palpable solecism in logic. It would give to the word “increase” a signification opposed to what it naturally implies, for the act of “increasing” anything necessarily presupposes the existence in some measure, or to some extent, of something which may be enlarged. In other words, to effect an increase is to add something to or enlarge something already in existence; or, as Webster’s Dictionary defines the word “increase,” it is

"that which is added to the original stock by augmentation or growth—to extend or enlarge in size, extent, quantity, number, intensity, value, substance," etc. It would be no less absurd to attempt to conceive a process by which something may be added to nothing than it would be to attempt to conceive the subtraction of something from nothing. If a person owning no money or other kind of property suddenly becomes the owner of property or money, his wealth has not thereby been "increased" within the lexicology or signification of that word. He has simply acquired something which previously he did not have.

The foregoing view of the constitutional provision under consideration coincides with that expressed in characteristically clear and forceful language in a dissenting opinion by the late learned Justice McFarland in the case of *Harrison v. Colgan*, 148 Cal. 69, 78, [82 Pac. 674], in which a similar constitutional provision, applicable, however, to the justices of the supreme and appellate courts, was considered. Among other things, he said: ". . . As to the salaries of the judges of the new superior courts, its provision is that 'until otherwise changed by the legislature the superior court judges shall receive an annual salary of three thousand dollars each.' But the provision as to salaries of justices of the supreme court is materially different. It is that 'during the term of the first judges elected under this constitution the annual salaries of the justices of the supreme court shall continue until otherwise provided by the legislature.' It does not provide at all for salaries of justices who shall be elected after the first term. It leaves that for the legislature, whose duty it was to provide for the salaries of said future justices. The legislature, however, neglected that duty until March 18, 1905. And when, at the last named date, the legislature did perform that duty by fixing the salary at eight thousand dollars, the salary was not thereby 'increased.' It simply for the first time fixed the salary, not by increasing an existing salary, for there was none, but by remedying the former neglect to fix any salary at all. The fact that from the time when the provision of the constitution as to the salaries of the first justices ceased, the state, without any law on the subject, paid the justices certain compensation, does not in any way affect the validity of the above views."

While the court, in the main opinion, did not accept the reasoning of Justice McFarland, there is nothing said in the majority opinion in that case which conflicts with the view expressed by the dissenting justice as to the point here under consideration.

We conclude that the petitioner is entitled to the compensation prescribed for his office by the law of 1915, and the demurrer to the petition herein is overruled and, accordingly, a writ of mandate will issue out of this court requiring the respondent to draw his warrant in favor of the petitioner for the salary of said petitioner, as prayed for herein.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

---

[Civ. No. 416. First Appellate District.—May 5, 1916.]

JOHN LAPIQUE, Appellant, v. ABRAHAM RUEF et al.,  
Respondents.

PLEADING—UNCERTAINTY IN COMPLAINT.—In this action it is held that the second amended complaint was ambiguous and uncertain and that the demurrers thereto were properly sustained.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

J. Lapique, *in pro. per.*, for Appellant.

Louis S. Beedy, De Laveaga & Dinkelspiel, and J. V. De Laveaga, for Respondents.

THE COURT.—This is an appeal upon the judgment-roll from an order entered in favor of the defendants Le Breton and Oliver sustaining their respective demurrers to the plaintiff's second amended complaint, and from a judgment entered thereon. The demurrers assailed the complaint as a whole and the twenty alleged causes of action attempted to be pleaded therein, upon the ground, among others, of uncertainty and ambiguity.

The demurrers upon the grounds stated were well taken, for the reason that it cannot be determined from the allegations of said second amended complaint whether plaintiff's causes of action were founded upon alleged injuries to his person, his property, or his character, or upon an injury to the property of one Jean Louis Ader. This complaint was ambiguous and uncertain in the further particular that it cannot be ascertained therefrom whether the acts complained of were committed by the defendants in their individual capacity, or in one of the other capacities in which they are alleged to have acted. The demurrers having been properly sustained upon the ground stated and in the particulars pointed out, it will not be necessary for us to discuss the other grounds of demurrer.

The judgment is affirmed.

---

[Crim. No. 457. Second Appellate District.—May 5, 1916.]

**THE PEOPLE, Respondent, v. HARRY MAUPINS,  
Appellant.**

**CRIMINAL LAW — MAYHEM — REFUSAL OF INSTRUCTIONS — WHEN NOT ERRONEOUS.**—It is not error for the court in a prosecution for mayhem to refuse to give instructions offered by the defendant where the substance of the requested instructions is covered by the court's oral charge to the jury; nor is the court's refusal, in such a case, to state to the jury why it does not give the instructions prejudicial to the defendant.

**ID.—VIEWING SCENE OF CRIME BY JURY—DISCRETION OF COURT.**—Granting or refusing the defendant's request, that the jury be permitted to view the premises where the offense was committed, is a matter within the discretion of the trial court, and its order refusing such request will not be interfered with on appeal where the record does not disclose any abuse of discretion.

**ID.—TIME OF TRIAL—SECTION 1382, PENAL CODE.**—Under section 1382 of the Penal Code, providing that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, if a defendant, whose trial has not been postponed on his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information, where the defendant is brought to trial within the sixty days, but there is a mistrial, and

the case is thereafter tried more than sixty days after the filing of the information, the mistrial constitutes "good cause," mentioned in said section, for the court's denying a motion to dismiss the information upon the ground that the action was not brought to trial within sixty days.

**APPEAL** from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

**A. T. Roark, for Appellant.**

**U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.**

**SHAW, J.**—Defendant was convicted upon an information filed August 11, 1915, charging him with the crime of mayhem.

He appeals from the judgment and an order denying his motion for a new trial.

The fact that the court refused to give certain instructions requested by defendant is assigned as prejudicial error. An examination of the oral charge made by the court to the jury discloses that the substance of these requested instructions was fully covered therein; hence there was no necessity for repetition. (*People v. Williams*, 32 Cal. 280; *People v. Strong*, 30 Cal. 151.) Appellant, while conceding this proposition, nevertheless insists that where the refusal to give an instruction is based upon such ground it is incumbent upon the court to so state in the presence of the jury. This contention finds support in *People v. Hurley*, 8 Cal. 390, 392, and *People v. Williams*, 17 Cal. 142, in the latter of which it is said: "If the court refuses a proper instruction in a criminal case, it is no answer to the error assigned for this cause, that an equivalent one was before given, unless this reason be assigned at the time for the refusal." We do not concede the doctrine thus enunciated in these early cases to constitute the law. Since the instructions refused are not read to the jury, no purpose could be subserved by requiring the court to state the ground for such refusal. In no event, however, could defendant be prejudiced by the



failure of the court to state in the presence of the jury its reason for refusing to give an instruction requested. (*People v. Ramirez*, 56 Cal. 533, [38 Am. Rep. 73].)

Error is also predicated upon a ruling of the court refusing to make an order granting defendant's request that the jury be permitted to view the premises where the offense was committed. Section 1119 of the Penal Code provides: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, . . . to the place, . . ." Upon this question, we repeat what was said by this court in the case of *People v. Howard*, 28 Cal. App. 180, [151 Pac. 754]: "It thus appears that the making of such order is a matter committed solely to the discretion of the court, and it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion." In *People v. Fitzpatrick*, 80 Cal. 538, 541, [22 Pac. 215], it is said: "Sending a jury out to view premises, even when clearly within section 1119 of the Penal Code, is a hazardous proceeding, and frequently leads to difficulties; and it would be well for trial courts not to make use of the power therein given except in cases which seem to imperatively call for it." There is nothing in the record which discloses any abuse of discretion on the part of the court in making the order complained of.

As stated, the information was filed on August 11, 1915. On October 19, 1915, more than sixty days after the filing of said information, defendant made a motion that the prosecution of defendant be dismissed upon the ground that more than sixty days had elapsed since the filing of the information charging him with the offense, which motion was denied. Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: . . . 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." It appears that upon the filing of the information defendant was duly arraigned and his trial set for August 20, 1915; that on said last-mentioned date the court proceeded with the trial, which continued until August 24, 1915, at which time

the jury, having been unable to agree upon a verdict, were discharged. Thereafter, on October 19, 1915, defendant was tried a second time and convicted. It thus appears that, within sixty days from the filing of the information, there was a mistrial, which, under the decisions of the supreme court, constitutes the "good cause" mentioned in the section quoted for the court's ruling. (*Ex parte Ross*, 82 Cal. 109, [22 Pac. 1086]; *People v. Chadwick*, 143 Cal. 116, [76 Pac. 884].)

An examination of the alleged errors predicated upon the rulings of the court in admitting and refusing to admit testimony, discloses no prejudicial error. Nor is there any merit in defendant's contention that his substantial rights were prejudiced by misconduct of the district attorney in commenting upon the testimony.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1894. Second Appellate District.—May 6, 1916.]

R. W. PRIDHAM et al., Appellants, v. WALTER A. LEWIS, Auditor of Los Angeles County, Respondent.

**PUBLIC OFFICERS—SUPERVISORS OF LOS ANGELES COUNTY—COMPENSATION—CONSTRUCTION OF CHARTER.**—Under the charter of Los Angeles, which provides that it is not intended to affect the tenure of office of any elective officer of the county in office at the time the charter took effect, nor to change the compensation of any such officer during his term, the supervisors of the county, elected before the charter took effect, are entitled only to the salaries fixed by the general laws of the state and not to compensation provided by the charter, and this applies to a supervisor appointed to office after the charter went into effect, to fill a vacancy created by the resignation of one so elected.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

William H. Fuller, for Appellant.

A. J. Hill, County Counsel, and Robert B. Murphy, Deputy County Counsel, for Respondent.



SHAW, J.—This is an appeal by petitioners from a judgment of the lower court denying them a writ of mandate requiring respondent, as auditor of Los Angeles County, to issue warrants in their favor upon the county treasurer for additional salary claimed by petitioners as members of the board of supervisors of said county.

It appears that the petitioners, Pridham, Norton, and Hinshaw, were, at the general election held in November, 1912, elected members of the board of supervisors of said county for terms expiring in January, 1917, and petitioners Manning and Butler were elected in November, 1910, to like offices for terms expiring in January, 1915. In March, 1914, Butler resigned, and petitioner Woodley was appointed to fill the office for the unexpired term.

At the November election of 1912, the electors of Los Angeles County, for the purpose of local government, adopted a charter, approved and ratified by the legislature on January 29, 1913 [Stats. 1913, p. 1486], section 4 of which is as follows: "The county of Los Angeles shall have a board of supervisors consisting of five members, each of whom must be an elector of the district which he represents, must reside therein during his incumbency, must have been such an elector for at least one year immediately preceding his election, and shall be elected by such district. Their terms of office shall be four years, each shall hold until his successor is elected and qualified, and they shall each receive a salary of \$5,000 per year payable monthly from the county treasury. They shall devote all their time during business hours to the faithful service of the public." By section 57 thereof it was provided that said charter should "take effect at noon on the first Monday in June, 1913."

The contention of petitioners is that, notwithstanding the fact that at the time when they were elected the general law fixed their salaries at three thousand dollars per year, they, by virtue of the provision contained in section 4 of said charter, are entitled to compensation for the balance of their terms at the rate of five thousand dollars per annum, from the time when the charter became effective, June 2, 1913. If section 4 as to salaries was the only provision contained in the charter touching the subject, petitioners might with some appearance of reason justify their contention. The section, however, must be read and construed with section 56, which

is as follows: "Nothing in this charter is intended to affect, or shall be construed as affecting, the tenure of office of any of the elective officers of the county or of any district, township or division thereof, in office at the time this charter goes into effect, and such officers shall continue to hold their respective offices until the expiration of the term for which they shall have been elected, unless sooner removed in the manner provided by law; nor shall anything in this charter be construed as changing or affecting the compensation of any such officer during the term for which he shall have been elected." As thus limited in effect, section 4, when applied to petitioners, does not purport to fix their salaries at five thousand dollars per year, but expressly disclaims any intent so to do. It would be difficult to find language more clearly expressing the obvious intent of the framers of the charter, namely: That section 4 shall not be "*construed as changing or affecting the compensation of any such officer [petitioners] during the term for which he shall have been elected.*"

The case of *Los Angeles County v. Hammel*, 26 Cal. App. 580, [147 Pac. 983], involved a question almost identical with that here considered, and it was there held that, notwithstanding the provisions of section 15 of the charter, which required all officers to pay into the county treasury all fees collected by them, the sheriff elected before the charter went into effect was, nevertheless, by virtue of the limitation contained in section 56, entitled to retain for his own use and as part of his compensation the fees collected by him, since the general law in effect when he was elected so provided. We regard what was there said as determinative of the question here presented. Here, as in that case, we are asked "to adopt one of the express provisions of the charter and make it effective, and discard altogether another plain provision which places a clear limitation upon the effect of the former." In that case we said: "It was altogether within the power of the people in adopting the charter to provide for the compensation to be paid to the officers of the county, and as an incident thereto, it certainly would be within the scope of that power to provide as to when the diminished (or increased) compensation, if any, provided to be paid should commence."

In answer to appellants' contention that their "compensation is \$5,000 per annum or nothing," we may suggest that, since the charter in express terms prohibits a construction



of any provision thereof the effect of which would be to change the compensation of such officers during the term for which they were elected, the compensation fixed by general law, and none other, must be deemed the salary to which petitioners are entitled.

The fact, as contended by counsel for appellants, that under the charter the board of supervisors is authorized to fix the salary of the sheriff, while here the salary of the board of supervisors is fixed in the *charter itself*, does not change the meaning and effect of section 56 in limiting and fixing the time when the provision as to salaries contained in section 4 shall become operative. The intention, clearly and unequivocally expressed, was that *all elective county officers* whose terms commenced before the charter went into effect should during such terms continue to draw the salaries which attached to such offices under the general laws of the state.

The cases of *Harrison v. Colgan*, 148 Cal. 69, [82 Pac. 674], and *Kingsbury v. Nye*, 9 Cal. App. 574, [99 Pac. 985], cited by appellants, have no application to the case at bar. They are authorities in support of the proposition that section 9 of article XI of the constitution, to the effect that the compensation of an officer shall not be increased after his election or during his term of office, is directed to the legislature and not to the people, who are the source of all power. Such, however, is not the question here involved.

What has been said with reference to the members of the board elected, is likewise applicable to Woodley, who, after the charter went into effect, was appointed to fill the vacancy created by the resignation of Butler. (*Storke v. Goux*, 129 Cal. 526, [62 Pac. 68]; *Larow v. Newman*, 81 Cal. 588, [23 Pac. 227].)

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 5, 1916.

[Crim. No. 466. Second Appellate District.—May 6, 1916.]

**THE PEOPLE, Respondent, v. MANUEL PONCHETTE,  
Appellant.**

**CRIMINAL LAW—CONTINUANCE—DISCRETION OF COURT.**—The granting or refusing a continuance in a criminal case is a matter largely in the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that the appellate court is justified in reversing such ruling.

**Id.—MURDER—REFUSAL OF CONTINUANCE—WHEN DISCRETION NOT ABUSED.**—In a prosecution for murder there was no abuse of discretion in refusing a continuance of the trial on the motion of the defendant where the application was made after the trial was commenced and proceeded to the extent of impaneling a jury, and the record shows that the defendant produced the testimony of other witnesses to prove an *alibi* pleaded, the continuance being asked on the ground of the absence of a witness who, it was claimed, would testify to the *alibi*.

**Id.—EVIDENCE—IMPEACHMENT OF DEFENDANT—WHEN ERROR CURED.**—In a prosecution for murder, where the defendant testified to his age and the prosecution, to impeach him, called other witnesses to testify to previous statements of the defendant inconsistent with his testimony as to his age, but the court subsequently suggested to defendant's attorney that, if he would move to strike out the evidence, the motion would be granted, which was done, and the jury instructed to disregard the testimony, if the admission of the evidence was erroneous, it was rendered harmless by the later action of the court.

**Id.—INSTRUCTIONS—FAILURE TO GIVE THROUGH INADVERTENCE—RECALLING JURY.**—Where the court in a murder case, through inadvertence, failed to give certain instructions to the jury requested by the defendant, but shortly after the jury retired, recalled it and, with the consent of defendant's counsel, gave them, the court's action was not prejudicial to the defendant's substantial rights.

**APPEAL** from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Dorn & Parker, and A. L. Dorn, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment and an order denying his motion for a new trial.

The alleged killing occurred in the city of San Diego on the night of June 15, 1915, at which time one John Douglas was fatally shot.

No testimony was tendered by anyone who witnessed the shooting, the evidence connecting defendant with the crime being largely of a circumstantial nature. Its character, however, is such that when considered in connection with statements proven to have been made by defendant, to the effect that he shot and robbed the deceased of a sum of money, was well calculated to leave little doubt in the minds of the jurors that defendant committed the crime with which he was charged.

The first error assigned relates to the action of the court in refusing a continuance of the trial upon application of defendant. The record shows that the cause was set down for trial on December 7, 1915. About 4 o'clock P. M. of said day, and after a jury had been impaneled to try the case, defendant applied to the court for a postponement of the trial upon the ground of the absence of Ben Eronas, a witness for whom a subpoena had been issued on November 26th, but not served. Defendant's affidavit was offered in support of the application, from which it appeared that Eronas, as defendant was informed and believed, had gone to Imperial County; that Eronas, if present, would testify that defendant spent the night upon which the crime was committed, to wit, June 15, 1915, at the house of said Eronas in the town of Escondido, distant some thirty or forty miles from San Diego, and that said fact could not be proved by any other witness. It was further averred by defendant that if the trial was continued one month affiant believed that he could have said witness present to testify as aforesaid. Section 1052 of the Penal Code provides that "when an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day." The application for continuance, however, was not made when the case was called for trial, as provided in this section, but, as shown by the record, made after the jury had been impaneled and the trial had proceeded, presumably for a day. Not only so, but

it further appears from the record that defendant, notwithstanding his affidavit, did produce other witnesses who testified that defendant was in Escondido on the night the homicide occurred, and the testimony, had it been produced, would have been cumulative in nature. (*Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 50, [116 Pac. 84].) The granting or refusing a continuance in a criminal case is a matter largely in the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that this court is justified in reversing such ruling. In view of the fact that the application was made after the trial had commenced and proceeded to the extent of impaneling a jury to try the defendant, together with the fact, as shown by the record, that defendant did produce the testimony of other witnesses who, had they been believed, would have established the *alibi* pleaded, it cannot be said there was any abuse of discretion in denying the application for a continuance, nor that defendant was prejudiced in his substantial rights by the ruling.

During the examination of defendant, who offered himself as a witness, he testified as to his age. Thereafter witnesses Lopez and Blair were called as witnesses on behalf of the state, who, over defendant's objection, were permitted to testify as to previous statements made by defendant as to his age, which statements were inconsistent with his testimony. The theory of the people, and also of the court, in making the ruling was that such testimony was proper as tending to impeach the evidence given by defendant. At a later stage in the trial, however, the court suggested to defendant's attorney that if he would move to strike out the evidence the motion would be granted. The motion was made and the evidence of these witnesses with reference to the statements so made by the defendant was stricken from the record and the jury instructed to disregard such testimony. Conceding the first ruling of the court in admitting the testimony to have been erroneous, any prejudicial effect thereof was rendered harmless by the later action of the court.

When the court instructed the jury it had before it several instructions which had been requested by defendant. Through inadvertence, however, these instructions, other than the first one so requested, were not at the time given the jury. Shortly after the jury had retired the court discovered the omission

and had the jury recalled, when, addressing defendant's attorney, the court said: "I overlooked certain instructions. I will give them to the jury now, if you do not object, Mr. Ellis," to which defendant's attorney replied: "No; that is just in accordance with my wishes." Whereupon the court read to the jury the instructions requested by defendant, in so far as they had not theretofore been given. It is inconceivable how such action could have been prejudicial to defendant's substantial rights; indeed, the recalling of the jury and giving them the instructions requested by defendant was favorable rather than otherwise, since it tended to emphasize the declarations of law therein contained. "The court possesses an inherent power to cause the jury to be returned for further instructions, a power wisely employed whenever the judge becomes convinced that he has not made them fully to understand an appropriate proposition of law, or has omitted to state portions of the testimony proper to be stated." (*People v. Perry*, 65 Cal. 568, [4 Pac. 572].)

While defendant claimed to have been in another town some thirty or forty miles from the place where the crime was committed on June 15, 1915, and produced testimony to show such fact, nevertheless it is apparent that the jury did not believe the same; and since there was ample testimony, if they did not believe such witnesses, upon which to base its verdict, the judgment and order appealed from must be affirmed, and it is so ordered.

Conrey, P. J., and James, J., concurred.

---

[Crim. No. 467. Second Appellate District.—May 6, 1916.]

THE PEOPLE, Respondent, v. J. T. WAUGH, Appellant.

CRIMINAL LAW—ROBBERY—INSTRUCTIONS—BAD REPUTATION OF DEFENDANT.—In a prosecution for robbery there was no error in the court's refusing to instruct the jury, at the request of the defendant, in substance, that if they believed from the evidence that defendant had in the past been leading a wild and immoral life, and had been guilty of acts which they deemed to be immoral or unlawful, or had an unsavory reputation, such facts should not be considered by them in determining the question of defendant's guilt or innocence of the

crimes charged, but that the same degree of proof was required to establish his guilt as that required to establish the guilt of any person charged with a similar offense, there being no issue as to the past life, character, or reputation of the defendant, and no evidence upon the subject, although a witness for the people testified that he and defendant went and hunted for some opium, and that the defendant informed him that the opium had been hidden at a certain place and if found could be sold to a Chinaman.

**ID.—ARGUMENT—COMMENT UPON DEFENDANT'S FAILURE TO TAKE STAND.**

It is fundamental that, since a defendant may not be compelled to be a witness against himself, a prosecuting officer may not comment adversely upon his failure to take the stand in his own behalf; but a statement made by the district attorney in his argument that defendant's possession of the stolen property shortly after the robbery was unexplained by *any sworn testimony*, did not violate this rule.

**APPEAL** from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

J. T. Reed, and E. P. Sample, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**SHAW, J.**—Defendant was convicted of the crime of robbery. From the judgment pronounced against him, and an order of court denying his motion for a new trial, he prosecutes this appeal.

Assignments of error are predicated upon the alleged insufficiency of the evidence to justify the verdict, the refusal of the court to give certain instructions requested by defendant, and alleged misconduct of the district attorney in referring to defendant's failure to testify in his own behalf.

As to the first contention, the extent of appellant's argument in support thereof is the mere assertion that "there is no evidence in the record that proves or tends to prove by direct testimony, substantial evidence or otherwise, that the defendant and appellant was in the vicinity or near the place of the alleged robbery." The victim of the robbery was Elizabeth Sarah Rae who, in company with another, about midnight on July 31, 1915, was traveling in an automobile

along the strand from Coronado to the mainland, when they were intercepted by two men who compelled them to get out of the car, at which time certain diamonds and jewelry in the possession of Mrs. Rae were forcibly taken from her. While there was no direct evidence identifying defendant as one of the participants in the crime, much circumstantial evidence was adduced which, together with the unexplained possession by defendant of the stolen goods near the place where the crime was committed and shortly thereafter, clearly tended to connect him with the robbery and justified the jury in reaching a verdict that he was guilty as charged; indeed, as stated, counsel for appellant does not otherwise seriously contend.

Defendant requested the court to instruct the jury in substance that if they believed from the evidence that defendant had, in the past, been leading a wild and immoral life, and had been guilty of acts which they deemed to be immoral or unlawful, or had an unsavory reputation, such facts should not be considered by them in determining the question of defendant's guilt or innocence of the crime charged, but that the same degree of proof was required to establish his guilt as that required to establish the guilt of any other person charged with a similar offense. The court refused to give such instructions, and the ruling is assigned as error. No issue was made as to the past life, character, or reputation of defendant, and no evidence was offered touching the subject. True, a witness called on behalf of the people, when testifying to his association with defendant in Tia Juana, Mexico, incidentally referred to the fact that they went out together and hunted for some opium, and on cross-examination he stated that defendant informed him that the opium had been hidden near Tia Juana Hot Springs and which, if found, he could sell to a Chinaman at Tia Juana; but this in nowise justified the giving of such instructions. Moreover, under the instructions given by the court clearly stating to the jury the facts which they were to consider in arriving at a verdict, and conceding the requested instructions proper, it is inconceivable that the failure to give them could in anywise have influenced the jury in its consideration of the case or affected the substantial rights of defendant.

The contention that the district attorney was guilty of misconduct during his argument, in referring to the fact that de-

defendant had not testified in his own behalf, is without merit and groundless. It is based upon a statement made by the district attorney and justified by the record, that defendant's possession of the stolen jewelry shortly after the robbery was unexplained by any sworn testimony. It is fundamental that, since a defendant may not be compelled to be a witness against himself (sec. 1323, Pen. Code), a prosecuting officer may not comment adversely upon his failure to take the witness-stand in his own behalf. We agree with the trial judge, however, that in making the statement attributed to him the district attorney did not infringe upon the rights so guaranteed defendant. Surely, if no explanation was offered on behalf of defendant as to his possession of the stolen goods, it would be competent for counsel representing the people to refer to the want of such explanation, since such possession unexplained was a material circumstance affecting his guilt or innocence. The action of the district attorney in commenting upon the failure of the defense to account for defendant's possession of the stolen property, was not indicative of a purpose on the part of such official to use against defendant the fact that he did not take the stand in his own behalf. (*People v. Fitts*, 4 Cal. App. 432, 436, [91 Pac. 536].)

We find no prejudicial error disclosed by the record, and the judgment and order appealed from are, therefore, affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1523. Third Appellate District.—May 6, 1916.]

THE SAN JOAQUIN AND KINGS RIVER CANAL AND  
IRRIGATION COMPANY, Respondent, v. JAMES  
J. STEVINSON (a Corporation), et al., Appellants.

EMINENT DOMAIN—ACTION TO CONDEMN EASEMENT—MOTION FOR NEW TRIAL—TIME FOR SERVING AND FILING NOTICE OF INTENTION.—In an action for the condemnation of an easement, where the issues of public use and public necessity are first heard and determined by the court, and the issue of damage is thereafter determined by a jury, the time to serve and file a notice of intention to move for a new trial runs from the time of entry of the findings and judgment, and not from the date of the verdict.

**ID.—SPECIAL ISSUES—TRIAL BY JURY—MOTION FOR NEW TRIAL—TIME FOR SERVING AND FILING NOTICE OF INTENTION.**—The time for serving and filing a notice of intention to move for a new trial begins to run when the verdict is rendered, where all the issues in the case are tried by a jury, but where some special issue, not determinative of the case, has been tried by a jury, the time does not begin to run upon the rendition of the verdict upon such special issue, but from the entry of the judgment.

**ID.—TRIAL BY JURY—CONSTRUCTION OF SECTION 659, CODE OF CIVIL PROCEDURE.**—The determination by a jury of some single isolated issue of fact in a case is not "the trial by jury" referred to in section 659 of the Code of Civil Procedure, where there remain other issues undisposed of.

**ID.—AMENDMENT OF 1915—MEANING OF TRIAL.**—In changing the phraseology of section 659 of the Code of Civil Procedure in the amendment of 1915, the legislature did not intend that the word "trial" used in the section should mean anything different from the words "the action was tried" found in former statutes. When the legislature used the word "trial," it must have intended to refer to the action being tried, and not alone to some one or more issues of fact to be submitted to the jury not decisive of the case.

**ID.—TRIAL—WHAT CONSTITUTES.**—In order to constitute a trial, all the issues raised by the pleadings must be actually or ostensibly disposed of, and there must be such proceedings, after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof.

**ID.—DETERMINATION OF QUESTION OF USE AND NECESSITY—ISSUES OF FACT—DETERMINATION BY COURT.**—In condemnation cases, the questions of use and necessity are exclusively for the court to determine, and these are issues of fact, though withheld from the jury, which must be determined by the court before final judgment of condemnation can be entered, and until found upon by the court there is no "trial" of the action as contemplated by section 659 of the Code of Civil Procedure.

**ID.—ORAL OPINION OF JUDGE NOT EQUIVALENT TO FINDINGS.**—Although the judge, in such a case, announced orally from the bench his conclusion as to the questions of use and necessity, this was in no legal sense equivalent to findings which the law requires him to make in writing and file with the clerk within thirty days after the cause is submitted for decision.

**APPEAL** from an order of the Superior Court of Merced County granting a new trial. **E. N. Rector, Judge.**

The facts are stated in the opinion of the court.

James F. Peck, Walter Shelton, and David L. Levy, for Appellants.

Edward F. Treadwell, and Frank H. Short, for Respondent.

CHIPMAN, P. J.—The action was commenced to condemn an easement in the land of defendants. In the trial of the case the evidence as to the issues properly triable by the court, to wit: The issue of public use and the issue of public necessity, were first heard by the court and the court orally announced its conclusion in favor of plaintiff, and thereupon the jury was impaneled and heard the evidence upon the issue of damages and a verdict was returned thereon on November 18, 1915, as follows: "We the jury in the above entitled action hereby ascertain and assess the damages to the 2407.27 acres of swamp and overflowed land described in the complaint at the sum of \$425,000.00. A. E. Owen, Foreman. (Indorsed): Filed this 18th day of November, A. D. 1915. P. J. Thornton, Clerk. Entered November 18, 1915. P. J. Thornton, County Clerk."

On November 29, 1915, the trial judge made and filed findings of fact and conclusions of law and on the same day entered judgment, of which notice was duly given to defendant, December 2, 1915. The judgment recites the fact that a jury had been "duly impaneled to try the issue as to damages, and said matter having been duly tried, and the jury having duly rendered its verdict in the words and figures as follows, to wit: [copy of verdict] . . . Now, therefore, by reason of the law and the findings, verdict and stipulation aforesaid, it is by the court ordered, adjudged and decreed," etc. No judgment on the verdict other than as above shown was entered.

Notice of intention by plaintiff to move for a new trial as to the issue of fact found by the jury was served on December 3, 1915, and filed December 4, 1915. The motion came on to be heard December 22, 1915, and was objected to by defendant on the ground that no notice of intention to move for a new trial was served or filed "within the time provided by law, to wit: within ten days after the date of the verdict of the jury in the above entitled case." The objections were overruled, the motion to dismiss the motion for a new trial was denied, and the motion for a new trial was granted.

The question is, Did the time for giving notice of intention to move for a new trial begin to run at the date of the verdict, November 1, 1915, or upon entry of findings and judgment, on November 29, 1915?

The question involves the construction to be given to section 659 of the Code of Civil Procedure, which reads: "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial." It is contended by appellant that this section of the code, as it read when the order was made, and as it now reads (amendment of 1915), differs materially from former statutes under which the decisions, relied upon by respondent, were given. By the amendment of 1874 the section read as follows: "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention," etc. (Code Amendments, 1873-74, p. 315.) In 1907 the section was made to read as follows: "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds," etc., thus substituting "receiving notice of the entry of the judgment" for "the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury." (Stats. 1907, p. 717.) The amendment of 1915 makes the action read substantially the same as it read in 1874, except the language now is— "within ten days after verdict, if the trial was by jury" instead of "within ten days after the verdict of the jury, if the action was tried by a jury," as in 1874. Section 195 of the Practice Act read as follows: "The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of the verdict; and when tried by a commissioner, referee, or by the court, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or court,

when written findings are filed by the court, or of the rendering of the decision when no findings are filed; . . . ”

By the amendment of 1874 the phraseology of the Practice Act—“if the action were tried by a jury”—was retained, and the only substantial difference made was to extend the time to ten days within which to file and serve the notice of intention and to make the time applicable alike to the trial by jury, referee, and the court. In the act of 1907 all reference in previous statutes to the trial by jury, referee, commissioner and the court was eliminated, and the time when the notice was to be given began with “notice of the entry of the judgment.” The amendment of 1915 goes back to the form of expression found in the Practice Act and in the act of 1874, except in the particular already pointed out.

It seems to us that the legislature did not mean by this change in phraseology to introduce a new or different procedure from that pursued under the form of expression used in the Practice Act or in the statute of 1874. *Plateau v. Lubeck*, 24 Cal. 364, was a case where it appeared that “the action was tried by a jury,” and it was held that the statute required notice “within five days after rendition of the verdict where the action has been tried by a jury,” and as no notice was given the statement could not be considered. *People ex rel. Allen v. Hill*, 16 Cal. 113, was an action in *quo warranto* to determine the right to vote certain shares of a corporation. Certain questions were submitted to a jury which we infer from the report of the case involved all the material issues that were raised in the action. The jury rendered their verdict on January 14, 1860. The cause “was held open” until January 16th, and on that day the attorney for the people presented and filed a motion for judgment and to set aside the special findings of the jury. This motion was argued on January 19th, and on January 20th, judgment was rendered for defendant. The record did not contain any service of notice of this motion. After judgment, and on January 21, 1860, relator filed and served a motion for a new trial, on the grounds that the special verdict and the judgment were contrary to law and the evidence, etc. Motion denied and relator appealed. Said the court: “The notice of motion for a new trial was not given in time and the proceedings based upon such notice must, therefore, be discharged. The trial terminated with the rendition of the verdict and the notice



should have been given within two days thereafter. (At that time the statute so provided.) It is urged that as the verdict was special, it was necessary to invoke the action of the court before a judgment could be entered upon it and that, therefore, the trial itself did not in contemplation of law terminate until the judgment was rendered. We cannot assent to this view. The facts were settled by the verdict, and it only remained for the court to pronounce the conclusion of the law upon the facts found. If the court erred in this respect the error is a proper subject for review, and a motion for a new trial was unnecessary. If the verdict was not satisfactory, the right to correct it did not depend upon the judgment, and the steps for that purpose should have been taken within the time limited by the statute."

The only issues of fact involved in the case were those submitted to and found upon by the jury. Nothing remained to be done but enter judgment. The trial was completed upon the coming in of the verdict.

In *Peabody v. Phelps*, 9 Cal. 213, the action was to recover the price paid for certain land as to which the seller was alleged to have made false and fraudulent representations. The cause was referred to a referee "to find the facts and report a judgment." On March 8, 1856, the referee reported a judgment for plaintiff for the amount claimed and judgment was entered on that day, which was in vacation. On appeal the judgment was reversed because rendered in vacation. At the following term, on filing the *remittitur*, the report of the referee was confirmed and, on March 28, 1857, judgment was entered for plaintiff. Counsel for defendant obtained an order from the court directing the referee to certify the evidence taken before him, which, being reported, a statement was prepared and notice given to set aside the report. It was contended that the reversal of the judgment originally entered could not operate to reopen the case beyond the error indicated by the reversal; that the right of appellant to a statement of the evidence, etc., had previously been lost, and that such right was not dependent on the time of the entry of judgment, but on the trial. It was hence urged that the time within which a motion for a new trial could be made began to run from the filing of the report of the referee when first filed (March 8, 1856), and not from March 28, 1857, after the reversal of the judgment. It was

held that the right of appellant to make his motion and prepare his statement, dated from the entry of the judgment on the twenty-eighth day of March, 1857, and not from the filing of the report or the trial before the referee. "The judgment previously entered by the clerk in vacation, reversed on appeal, was a nullity," said the court, "and could not affect the appellant's right to move for the rendition of judgment by the court." The court points out that the time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend upon the character of the reference; whether it be special, to report facts, or general, to report upon the whole issue. "Upon facts found, whether by report of the referee or special verdict of a jury, the direct action of the court must be invoked before judgment can be entered. Though the *trial*, in such cases has ended, judgment does not follow immediately as a matter of course; and the time within which the notice of motion to set aside the report or verdict must be given should be the same in the two cases, and date from the filing of the report or the rendition of the verdict."

If we rightly understand these cases, they hold that where the action is tried by a jury—and by action is meant all the issues in the case—the time for serving and filing notice of intention begins to run when the verdict is rendered. But we find no cases under the earlier statute holding that where some special issue, not determinative of the case, has been tried by a jury, the time within which to serve and file notice of intention begins to run upon the rendition of the verdict upon such special issue. The reason for the running of the time upon the rendition of the verdict is found in what was said in *People ex rel. Allen v. Hill*, 16 Cal. 113, namely: "The trial terminated with the rendition of the verdict; . . . it only remained for the court to pronounce the conclusion of the law upon the facts found." Obviously this could not be the case where issues remained to be determined by the court. It was so held in *Bates v. Gage*, 49 Cal. 126, which was a case in equity, and it is the settled rule in that class of cases that where special issues are submitted to a jury their findings are merely advisory, and the trial is not terminated when the jury render a verdict, but where the court renders judgment.

*James v. Superior Court*, 78 Cal. 107, [20 Pac. 241], was a proceeding for revocation of letters of administration. The

trial judge submitted certain issues to a jury which were found upon, but the court took no further action in the matter and the case had not been decided. An application for a writ of mandate to compel the court to settle a statement on motion for a new trial was denied, the supreme court holding that the verdict of the jury was not a verdict "in an action tried by a jury within the meaning of section 659 of the Code of Civil Procedure, but was merely advisory to the judge and of no force or effect until adopted by him." The motion was held premature.

*Reclamation District No. 556 v. Thisby*, 131 Cal. 572, [63 Pac. 918], was a condemnation case. Two actions were tried together and disposed of upon a single record. "Certain issues were submitted to a jury and its verdict thereon adopted by the court and additional findings were made upon other issues. Upon these findings the court rendered judgment in favor of the plaintiff and afterward denied the defendant's motions for a new trial. From these orders defendants have appealed." Respondent contended that the court was without jurisdiction to entertain the motion for a new trial, "inasmuch as no proper notice of intention to make such motion had been given." The notice of intention was served and filed within ten days after the jury had given their answers to the special issues submitted to them, and it was held that the notice was premature since the decision of the court was not made until six months later. The court said:

"Although certain special issues were submitted to a jury, these issues formed only a portion of the controversy between the parties to the actions, and the remaining issues were tried by the court and findings of fact made by it thereon, upon which, together with the answers of the jury to the questions submitted to them, the court rendered its judgment in favor of the plaintiff. The 'actions' were therefore tried by the court, and under section 659 of the Code of Civil Procedure until the court had rendered its decision, it was not competent for either party to give notice of its intention to move for a new trial. The notices of intention to move for a new trial were given and filed November 1, 1897, while the decision by the court was not made until April 21, 1898. These notices were within ten days after the jury had given their answers to the special issues submitted to them, but as the 'actions' were not tried by a jury, the notices were prema-

ture and gave to the court no power to act upon the motions which should thereafter be made under the notices. (*Bates v. Gage*, 49 Cal. 126; *Bell v. Marsh*, 80 Cal. 411, [22 Pac. 170].) No judgment could have been rendered in the case at the time the jury rendered its verdict, and the trial of the action was not concluded until the court had rendered its 'decision' upon all of the issues submitted to it. 'A case has not been tried until all the issues have been disposed of and there has been no decision until the court has passed upon the facts and drawn its conclusions of law therefrom.' (*Bell v. Marsh*, 80 Cal. 411, [22 Pac. 170]; *Crim v. Kessing*, 89 Cal. 478, [23 Am. St. Rep. 491, 26 Pac. 1074]; *Broder v. Conklin*, 98 Cal. 360, [33 Pac. 211].) The rule of procedure for causes tried by the court is the same whether they are cases in equity or actions at law. (*Hastings v. Hastings*, 31 Cal. 95.)"

In the somewhat similar case of *Fountain Water Co. v. Dougherty*, 134 Cal. 376, [66 Pac. 316], the same rule was applied in a condemnation case.

*Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 242 [91 Pac. 1015], was prohibition to restrain the court from enforcing an order authorizing plaintiff to take possession and use certain lands which had been condemned in an action brought by the San Francisco, Vallejo & Napa Valley Railroad against petitioners. Issues in the case relating to the damages for the taking were submitted to a jury and their answers were returned. The court reserved to itself the question of necessity for the taking, and did not pass upon that issue until after the verdict was rendered. It was said in the opinion that the more orderly procedure would be for the court to find upon the question of necessity before the issue of compensation is submitted to the jury. "But," said the court, "if the jury have sufficient information as to the proposed action of the court to act intelligently upon the question of compensation and without prejudice to the substantial rights of the defendant, the reservation by the court of the decision of the question of necessity until after the verdict is rendered is not even erroneous, much less in excess of jurisdiction." (Citing *City of Los Angeles v. Pomeroy*, 124 Cal. 597, [57 Pac. 585].)

Appellant places great stress upon the language of section 659—"if the trial was by jury," claiming that the term "trial" means the determination by the jury of any issue of

fact. That is, whenever, in an action or special proceeding, an issue of fact is submitted to and found upon by a jury their verdict on that issue is a trial by jury as contemplated by the statute, and if the losing party desires to have the verdict reviewed by a new trial he must serve and file his notice of intention "within ten days after the verdict," regardless of the termination of the trial or the action of the court on issues not submitted to the jury and remaining undisposed of. Section 656 of the Code of Civil Procedure, is cited as supporting this contention. It reads: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." We do not understand this section as defining what is meant by a trial. We do not think that the determination by a jury of some single, isolated issue of fact in a case is "the trial by jury" referred to in section 659, where there remain other issues undisposed of. It may be that a single issue of fact is such as may be set aside when a new trial is sought under the code, but the question still remains unanswered as to when the time begins to run against the motion, except as it is answered by section 659, where we are told that the notice of intention must be made "after verdict, if the trial was by jury." We cannot believe that in changing the phraseology used in the amendment of 1915 the legislature intended that the word "trial" used in the section should mean anything different from the words, "the action was tried," found in former statutes. When the legislature used the term "trial" it must, we think, have intended to refer to the action being tried, and not alone to some one or more issues of fact to be submitted to the jury not decisive of the case; that it was not intended to introduce a rule at variance with the procedure of half a century.

The notice of intention must be given "within ten days after receiving notice of the entry of judgment, or within ten days after verdict, if the trial was by jury," etc. "Entry of judgment" presupposes a "trial," and it would seem reasonable that when the word "trial" is used in connection with the verdict it means a trial in the true sense—i. e., a determination of all the issues and such determination as will authorize judgment to be entered.

As was said in *Bell v. Marsh*, 80 Cal. 411, [22 Pac. 170]: "A case has not been tried until all the issues have been disposed of." In order to constitute a trial, all the issues raised

by the pleadings must be actually or ostensibly disposed of. There must be such proceedings, after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. Thus, where only a part of the issues were disposed of, and the rest were reserved, it was held there was no trial. (1 Hayne on New Trial, sec. 1, par. 2.) Mr. Hayne says: "Where only a part of the issues are submitted to a jury, the notice of intention should not be given until all the issues have been disposed of." (1 Hayne on New Trial, sec. 18, par. 1.)

In *Kiel v. Reay*, 50 Cal. 61, the action was on certain promissory notes, and certain special issues were submitted to a jury, but did not include the issue made by the pleadings as to whether plaintiff was the owner and holder of the notes; the verdict responded only to the special issues submitted, there having been no general verdict. A motion for judgment on the verdict was granted, but the supreme court reversed the judgment, holding that a material issue raised by the pleadings had not been disposed of and the result was simply a mistrial.

In *Crowther v. Rowlandson*, 27 Cal. 377, 385, the court said: "By the one hundred and ninety-fifth section of the act of 1863, it is provided that when 'an action has been tried by the court, or by a commissioner or referee,' the party intending to move for a new trial shall give a written notice thereof within ten days after receiving written notice of the findings of the judge, or the report of the commissioner or referee. The issues in this case were tried in part by the court and were in part committed for trial to a referee; and, therefore, the case does not fall within either of the express allotments of the section. But it is apparent that the intention of the legislature was, that proceedings in new trial should be postponed until cases had been 'tried.' The trial of this case was not complete until the final report of the referee was filed." The action was to set aside a conveyance alleged to have been made when the grantor was insane. The same rule was announced in *Hinds v. Gage*, 56 Cal. 486, which was a case for an accounting between parties, and also in *Duff v. Duff*, 71 Cal. 513, [12 Pac. 570].

The rule in equity cases is, as we have seen, and as Mr. Hayne states it, *supra*: "It is manifest that the equity rule

must be held to apply in common law cases, for if judgment be entered upon a special verdict which has not disposed of all the issues, there will be a mistrial."

In *Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238], the court submitted certain issues to the jury and reserved certain other issues to itself which, after the verdict was rendered, were disposed of by findings of its own. On March 22, 1912, the verdict was rendered and the clerk entered judgment thereon. The court said: "We regard the judgment entered by the clerk on March 22, 1912, as premature and without authority or effect, for, upon the facts stated, the trial was not concluded." It seems quite clear to us that unless, as appellant stoutly contends, the term "trial" as used in section 659 means any issue submitted to the jury, and does not mean the determination of all the issues, the contention of appellant cannot be sustained. That the term has no such broad meaning we are satisfied. We need not concern ourselves with the reason for the decisions that in condemnation cases the questions of use and necessity are exclusively for the court to determine (*Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238]); these are issues of fact, though withheld from the jury, and must be determined by the court before final judgment of condemnation can be entered, and until found upon by the court there is no "trial" of the action as contemplated by section 659 of the Code of Civil Procedure.

Although the judge announced orally from the bench his conclusion as to the questions of use and necessity, this was in no legal sense equivalent to findings which the law required him to make, and which were not made until after the jury had rendered their verdict. Section 632 of the Code of Civil Procedure, provides that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." "The opinion of the court, expressed from the bench in deciding a case, is no part of its decision." (*American Well etc. Co. v. Superior Court*, 19 Cal. App. 497, 499, [126 Pac. 497].) In the formal findings of fact and conclusions of law are to be found the only legal expression of the views of the court. (*Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 595, [77 Pac. 1113]; *Sullivan v. Washburn & Moen Mfg. Co.*, 139 Cal. 257, 259, [72 Pac. 992].)

"Until the decision itself has been entered in the minutes, or reduced to writing by the judge and signed by him, and filed with the clerk, the case has not been tried in legal intent." (*Hastings v. Hastings*, 31 Cal. 95.)

The order granting the motion for a new trial is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 5, 1916.

---

[Crim. No. 420. Second Appellate District.—May 6, 1916.]

**THE PEOPLE, Respondent, v. J. B. VERMILLION,  
Appellant.**

**STATE MEDICAL ACT—TREATING SICK WITHOUT LICENSE.**—In this prosecution for having practiced a system or mode of treating the sick without a certificate issued by the state board of medical examiners, it is held on the authority of *People v. Jordan*, 172 Cal. 391, and *People v. Ratledge*, 172 Cal. 401, that the judgment and order denying a new trial should be affirmed.

**Id.—PRACTICING WITHOUT COMPENSATION—VIOLATION OF ACT.**—The State Medical Act makes it unlawful for a person to practice any art of healing without having first obtained a certificate from the medical board, and the act is intended to cover such practice whether the service is gratuitous or not.

**Id.—REFUSAL OF INSTRUCTIONS—WHEN PROPER.**—Where the court refuses to give certain instructions offered by the defendant for the reason that the same propositions have been sufficiently stated in the instructions given, it is not necessary for the court to state to the jury the reason for the refusal.

**APPEAL** from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Clifford C. Pease, and L. L. Burr, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

THE COURT.—Appellant was convicted of having practiced a system and mode of treating the sick and afflicted without possessing a certificate issued by the state board of medical examiners entitling him so to do. The supreme court of this state, in the cases of *People v. Jordan*, 172 Cal. 391, [156 Pac. 451], and *People v. Ratledge*, 172 Cal. 401, [156 Pac. 455], has decided adversely to appellant's contentions, as to the main questions raised upon this appeal, and upon the authority of those decisions the judgment and order denying the motion for a new trial should be affirmed.

The added contention not considered in the cases cited, to wit, that appellant could not be properly convicted unless it were shown that he charged a fee for his services, we think must be decided against him. The statute under which the prosecution was had makes it unlawful for a person to practice any art of healing without having first obtained a certificate from the medical board, and we think the act is intended to and does cover such practice whether the service is gratuitous or not. However, it was shown in evidence by the defendant's own testimony that he had engaged in the practice of a healing art, styling himself a "chiropractic," for a period of five years immediately preceding the date of his arrest. It was shown that he maintained a regular office in a business building in the city of San Diego, and there was testimony showing that he had treated in a professional way three different patients who were suffering from bodily ills. There was evidence also that in one case payment was offered and accepted by him in return for the services rendered. Defendant admitted the receipt of this money, but declined to state whether he regularly made a charge for his services. The fair inference from all the testimony which we think the jury was entitled to draw, was that he regularly practiced a healing art, and, furthermore, that he did so for remuneration. Some contention is made that the service which appellant rendered to persons described in the evidence was in the nature of emergency service not prohibited by the Medical Act. There was no evidence tending to show that the services were of an emergency character; that is, services rendered by way of affording temporary relief until the services of a regular practitioner could be procured. The persons who were thus treated were shown to have previously had the attention of physicians and their ailments were more or

less of a chronic sort, and that the services of appellant were sought, to some extent at least, as a last resort, and after other practitioners had failed to afford relief. Treatment so rendered could not in any sense be classed under the head of "emergency service."

The instructions given by the court we think properly stated the law, and that no error was committed in refusing to charge the jury as appellant requested in certain offered instructions. It was not necessary, where the court refused instructions offered, for the reason that the same propositions had been sufficiently stated in the instructions given, to state such reason to the jury. See *People v. Maupins*, ante, p. 392, [158 Pac. 502], decided by this court on the fifth day of May, 1916.

The judgment and order are affirmed.

---

[Crim. No. 433. Second Appellate District.—May 6, 1916.]

THE PEOPLE, Respondent, v. N. C. OAKLEY, Appellant.

STATE MEDICAL ACT—TREATING THE SICK WITHOUT LICENSE—TEACHING CHIROPRACTIC SYSTEM.—A teacher and demonstrator of the chiropractic system before a class in a chiropractic school, the subjects of such demonstration being the sick and afflicted who, at his hands, sought and received treatment free of charge, is not exempt from the operation of the State Medical Act.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Clifford C. Pease, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

THE COURT.—Appellant was convicted of having practiced a system and mode of treating the sick and afflicted without possessing a certificate issued by the state board of medical ex-



aminers entitling him so to do. The facts in the case are substantially the same as those involved in that of *People v. Vermillion*, ante, p. 417, [158 Pac. 504], an opinion in which was this day filed. While defendant's practice, as shown, was as a teacher and demonstrator of the chiropractic system before a class in a chiropractic school, the subjects of such demonstration being the sick and afflicted who, at his hands, sought and received treatment free of charge, such fact did not exempt him from the operation of the law. An examination of the record discloses no grounds possessing any merit other than those urged in the Vermillion case, *supra*, and in the cases of *People v. Jordan*, 172 Cal. 391, [156 Pac. 451], and *People v. Ratledge*, 172 Cal. 401, [156 Pac. 455], upon the authority of which the judgment and order appealed from must be and are affirmed.

---

[Civ. No. 1815. First Appellate District.—May 9, 1916.]

ARTHUR G. ANNESLEY, Appellant, v. FRANCISCO  
MACHADO VICTURINO et al., Respondents.

PLEADING—AMENDMENT—STATEMENT OF SAME CAUSE OF ACTION.—In an action on a contract for the sale of real property where a demurrer was sustained to the first complaint, plaintiff thereafter filing an amended complaint in which he prayed that his title to the property be quieted, and upon a demurrer being sustained to this complaint, he filed a second amended complaint, setting up a cause of action for specific performance, it was error for the court to strike the latter complaint from the files on the ground that it embodied a new cause of action, where it appeared from the three pleadings that the cause of action was based upon an interest in the property in question created by the provisions of the contract of sale, the terms of which were set forth in full in each complaint, and which constituted the foundation of each cause of action attempted to be stated, the amendments only stating the facts in different forms to accord with the remedy which plaintiff conceived himself to be entitled, and not changing the cause of action.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Arthur Crane, for Appellant.

Ross & Ross, for Respondents.

**THE COURT.**—This is an appeal from a judgment entered upon an order striking out plaintiff's second amended complaint.

In the original complaint it was alleged that on January 9, 1906, the defendants made a contract with plaintiff's assignor, Edgar L. Wheeler, wherein they agreed to sell to Wheeler the real property described in the complaint. The complaint was defective, and a demurrer thereto having been sustained the plaintiff filed an amended complaint, in which he prayed that his title to the property covered by the contract referred to be quieted. This complaint also was obviously defective, and, upon a demurrer thereto being sustained, the plaintiff in due time filed a second amended complaint, the allegations and prayer for relief of which make the action one for specific performance. Upon motion this complaint was stricken from the files on the ground that it embodied a new cause of action.

This appeal is not before us upon an order sustaining a demurrer to the second amended complaint, and hence no attention will be paid in this opinion to any suggested defective allegation thereof. We think the court erred in striking out this second amended complaint. It is clear from a consideration of the three pleadings filed by the plaintiff that his asserted cause of action is based upon an interest in the property in question created by the provisions of the above-mentioned contract, the terms of which are set forth in full in each of the complaints, and which constitutes the foundation of the action attempted to be stated. The subject of the controversy, or the cause of action, it thus appears, is the same in each pleading. The amendments only stated the facts in different forms to accord with the remedy to which the plaintiff conceived himself to be entitled, and did not change the cause of action. (*Born v. Castle*, 22 Cal. App. 282, [134 Pac. 347]; *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, [142 Pac. 910].)

Judgment reversed.

A petition for a rehearing of this cause was denied by the district court of appeal on June 7, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 6, 1916.

---

[Civ. No. 1987. Second Appellate District.—May 11, 1916.]

**ALICE MORTELL, Appellant, v. LOS ANGELES COLLEGE OF OSTEOPATHY (a Corporation), Respondent.**

**ACTION FOR MALPRACTICE—PARTIES—HUSBAND AND WIFE—ACTION BY WIFE ALONE—STATUTE OF LIMITATIONS.**—The husband is a necessary party to an action for damages for malpractice upon his wife, and where the husband deserts the wife after the acts of malpractice, the statute of limitations does not begin to run against the wife's right to bring the action in her own name until said desertion occurs.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

John S. Steely, Frank A. Jeffers, and John F. Sheran, for Appellant.

Jennings & Horton, and A. B. Shaw, for Respondent.

**JAMES, J.**—This action was brought by the plaintiff, a married woman, to recover damages by reason of the alleged malpractice of the defendant which resulted in injury to her person. A demurrer was sustained to plaintiff's amended complaint. In addition to the general ground assigned by the demurrer that the complaint did not state facts sufficient to constitute a cause of action, in support of which ground no contention is made here, it was objected that the alleged cause of action set out was barred by the statute of limitations; further, that there was a defect of parties plaintiff in that the husband of this plaintiff should have been made a party to the action. Upon plaintiff failing to amend, a judgment of dismissal followed, from which this appeal was taken.

It was alleged in the amended complaint that at the time the alleged acts of malpractice were committed and thereafter, plaintiff was a married woman living with her husband, and that the husband at all times subsequent to the date of the commission of the alleged acts of malpractice refused to permit the plaintiff to bring an action to recover damages for her injuries, or to join with the plaintiff in such suit. It was further alleged that in the month of September, 1912, the husband deserted the plaintiff against her wish and without her consent, and that he had ever since that time continued to desert and abandon plaintiff without cause, and to live separate and apart from her against her wish and consent. This amended complaint was filed on June 5, 1913. There is no contention but that if the statute of limitations as against the wife's cause of action did not commence to run until the date of the alleged desertion of her by her husband, then the demurrer for that ground was improperly sustained. Section 370 of the Code of Civil Procedure provides that a wife may sue alone when she is living separate and apart from her husband by reason of his desertion of her. Section 352 of the same code provides, in part, as follows: "If a person entitled to bring an action, mentioned in chapter 3 of this title, be, at the time the cause of action accrued, . . . a married woman, and her husband be a necessary party with her in commencing such action, the time of such disability is not a part of the time limited for the commencement of the action." It was necessary for the plaintiff, if living with her husband, to have him join with her in the prosecution of her claim for damages for the personal injuries alleged to have been suffered by her. Under the facts as alleged in the amended complaint, the statute of limitations did not commence to run against the plaintiff until she was freed of her disability to prosecute the action alone, to wit, until the date of the desertion of her by her husband. Taking that date as the date to be considered in determining the plea made to the amended complaint by demurrer, it is clear that the court was in error in making the order sustaining the demurrer. That the husband was a necessary party to the action at the time the cause thereof accrued and until the date of his desertion of the wife, is sustained by the decision in the case of *Moody v. Southern Pacific Co.*, 167 Cal. 786, [141 Pac.

388]. That case answers all of the objections made by the respondent, and upon the authority of it a reversal must be ordered.

The judgment appealed from is reversed.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1890. Second Appellate District.—May 11, 1916.]

THE PEOPLE ex rel. U. S. WEBB, Attorney-General et al.,  
Appellants, v. SPENCER M. MARSH, Respondent.

COMMON LAW—WHEN APPLICABLE—SECTION 4468, POLITICAL CODE.—

Under section 4468 of the Political Code the common law is the rule of decision only in those cases where it is not repugnant to or inconsistent with the constitution of the United States, or constitution or laws of this state.

Id.—PUBLIC OFFICERS—RESIGNATION—MODE OF.—Section 995 of the Political Code declares the mode in which a public officer may resign his office, namely, that it must be in writing, and if the incumbent be a county officer not commissioned by the Governor, it shall be made to the clerk of the board of supervisors.

Id.—DEFINITION OF "RESIGN" AND "RESIGNATION."—The word "resign" is defined to "give up an office or trust," and "resignation" as being "the act of resigning or giving up, as a claim, possession, or position."

Id.—VACANCY IN OFFICE—HOW CREATED.—Under section 996 of the Political Code an office becomes vacant on the happening of any of the events therein specified before the expiration of the term, including the resignation of the officer, and, under this statute, a vacancy arises when the incumbent resigns in the mode provided by law, subject to the terms contained in his letter of resignation.

Id.—RESIGNATION OF DISTRICT ATTORNEY—ACCEPTANCE UNNECESSARY.—The resignation of the district attorney of a county which is in writing and in accordance with the statute, and by its terms to take effect upon delivery to the clerk of the board of supervisors, becomes effective immediately upon delivery to such clerk, and it is not necessary that it shall be accepted by the board of supervisors; and an attempt by the party, after delivery of the resignation to the clerk, and before its acceptance by the board, to withdraw the same, is of no effect.

Id.—FILING PAPERS—WHAT CONSTITUTES.—No express provision is made in the law providing that a letter of resignation shall be filed,

but, like documents which are required to be filed, the delivery thereof to the clerk of the board of supervisors, he being the officer designated by section 995 of the Political Code, to whom the resignation shall be made, constitutes the filing thereof; and it is not necessary to indorse such document as filed, the file-marks being only evidence of the fact of such delivery.

**DE.—VACANCY—APPOINTMENT OF SUCCESSOR.**—Conceding that one who has tendered his resignation in the mode prescribed by statute to take effect immediately, or upon the delivery of the document to the clerk, may nevertheless hold over until his successor is appointed, such fact is not inconsistent with the theory that a vacancy exists in the office to be filled by the appointing power.

**APPEAL** from a judgment of the Superior Court of San Diego County. W. A. Sloane, T. L. Lewis, and W. R. Guy, Judges.

The facts are stated in the opinion of the court.

Henning & McGee, for Appellants.

Luce & Luce, for Respondent.

**SHAW, J.**—The purpose of this proceeding was to determine the title to the office of district attorney of San Diego County.

It appears from findings of the court as to which there is no controversy, that on June 22, 1915, D. V. Mahoney was the duly elected, qualified, and acting district attorney of San Diego County; that on said date he signed and delivered to C. H. Swallow, a member of the board of supervisors of said county, his resignation of the office of district attorney, a copy of which document is as follows:

“June 22, 1915.

“To the Honorable Board of Supervisors of the County of San Diego, State of California.

“Gentlemen:

“I hereby tender to your Honorable Body my resignation from the office of District Attorney of the County of San Diego, State of California, and ask that the same be accepted and take effect on the filing of this my resignation with the Clerk of the Board of Supervisors of the County of San Diego, State of California.

D. V. MAHONEY,

“District Attorney of the County of San Diego, State of California.”

That at about 7:30 o'clock P. M. on said June 22d, Swallow went to the home of B. Allen, who was a deputy county clerk and acting clerk of the board of supervisors, to whom he delivered said resignation so received by him from Mahoney, upon which said Allen at the time indorsed the words: "Filed June 22, 1915, J. T. Butler, Clerk, By B. Allen, Deputy." And on the following morning, June 23d, upon reaching the county clerk's office where she was employed as such deputy, she delivered the document to J. T. Butler, county clerk and *ex-officio* clerk of the board of supervisors, who retained the same in his custody until June 28, 1915, at which time it was presented to a special meeting of the board of supervisors duly convened pursuant to a call therefor, notice of which as served stated that it was "for the purpose of considering and accepting the resignation of D. V. Mahoney as district attorney and, if accepted, appointing his successor"; at which time, all the members of the board being present, the resignation of Mahoney was accepted, and the respondent, Spencer M. Marsh, was elected to fill the vacancy. At this meeting of the board of supervisors so held on June 28th, and before the board had taken any action with regard to said resignation or the election of Marsh to fill the vacancy, Mahoney caused to be served on the board, and each member thereof, a written notice of revocation, stating therein that he withdrew and recalled the resignation theretofore tendered. In addition to these facts as to which, as stated, there was no controversy, the court upon conflicting evidence, ample in tendency, however, to support the same, found that the delivery of said resignation by Swallow to the clerk, and the filing thereof, was in obedience to the instructions of Mahoney given to Swallow when the document was delivered to him, and that at the time Mahoney was mentally competent and well knew the purport and effect of the same, and intended the resignation to go into effect according to the terms thereof. As a conclusion of law, the court found in effect that the resignation was duly made to the clerk of the board of supervisors of said county and became effective on June 23, 1915, by reason of which a vacancy existed in the office of district attorney of said county; that Spencer M. Marsh was duly elected to fill the vacancy on June 28, 1915, on which date he was and ever since has been entitled to said office by virtue of said election.

Judgment followed for the respondent, from which the relator appeals.

Appellant's chief contention is that the question presented must, under section 4468 of the Political Code, be determined by applying the common-law rule which denied the right of a public officer to resign his office without the consent of the appointing power manifested by an express acceptance of the resignation or in some other mode equally significant of its intention so to do (*Mechem on Public Officers*, sec. 414; *Throop on Public Officers*, sec. 409; *Edwards v. United States*, 103 U. S. 471, [26 L. Ed. 314]; *Reiter v. State*, 51 Ohio St. 74, [23 L. R. A. 681, 36 N. E. 943]); and if this be true, it follows, says appellant, there was no vacancy, since, before the resignation was accepted, Mahoney, as he had a right to do (*People v. Porter*, 6 Cal. 26; *People v. Board of Police*, 26 Barb. (N. Y.) 481, 487; *State v. Murphy*, 30 Nev. 409, [18 L. R. A. (N. S.) 1210, 97 Pac. 391, 720]), recalled and withdrew his letter of resignation. Section 4468 of the Political Code, however, declares the common law to be the rule of decision *only in those cases* where it is not repugnant to or inconsistent with the constitution of the United States, or constitution or laws of this state. Conceding the common-law rule as stated, which it may be noted was based upon a theory not in harmony with, but entirely at variance with, the modern idea which prevails as to a public office, and conceding also, where acceptance is necessary to render the resignation effective, the right of a public officer who has tendered his resignation to recall it at any time before it is accepted, we are nevertheless of the opinion that such rule has been abrogated in this state by statutory provisions. Webster defines the word "resign," "to give up an office or trust"; and defines "resignation" as being "the act of resigning or giving up, as a claim, possession or position." Section 996 of the Political Code declares that "An office becomes vacant on the happening of either of the following events before the expiration of the term: 1. The death of the incumbent; 2. . . . 3. His resignation; . . ." Now, since resignation means, as stated, the act of giving up a claim, possession, or position, it seems to clearly follow, under this provision of the statute, that a vacancy arises when the incumbent resigns in the mode provided by law, subject of course to the terms contained in the letter

of resignation. Section 995 of the Political Code declares the mode in which a public officer may resign his office, namely, that it must be in writing, and if the incumbent be a county officer not commissioned by the Governor, that it shall be made to the clerk of the board of supervisors. In the case at bar it was in writing, and since it was, as intended to be by appellant, delivered to and filed with the clerk of the board of supervisors, it was made in full compliance with the statute. We are aware that authorities may be found which appear in conflict with this conclusion. Reference to them, however, shows they were based upon the finding of the court that no statute existed upon the subject changing the common-law rule, such as *Edwards v. United States*, 103 U. S. 471, [26 L. Ed. 314], a Michigan case, where it was held the common-law rule prevails. The case of *Kane v. Jones*, decided by the supreme court of Washington, 46 Wash. 631, [91 Pac. 2], involved a statute identical with section 996 of the Political Code of this state, under which the court, after reviewing the authorities from a number of states, held that the common-law rule prevailed in that state. After referring to section 1548 of the Washington Code, corresponding with said section 996 of our Code, the court said: "We see nothing in the above which changes the common-law rule. It is true it is declared that an office shall become vacant upon the resignation of the incumbent, *but nothing is said about the method of effecting a resignation.* [Italics ours.] The silence of the statute in that regard should be construed to mean that the established common-law method still obtains." It will be noted that our statute, section 995 of the Political Code, in express terms declares the method of effecting a resignation which, according to the supreme court of Washington, was wanting in the laws of that state. A number of authorities are cited by respondent in support of the contention that the acceptance of a resignation is not necessary to create a vacancy, but that the vacancy is created by the act of the public officer by delivering his written resignation to the appointing power or official authorized by law to receive the same for such depository. Among the early cases so holding is that of *People v. Porter*, 6 Cal. 26, where it is said: "The tenure of an office does not depend on the will of the executive, but of the incumbent. . . . There can be no doubt that a civil officer has a right to

resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. . . ." Notwithstanding the fact that this case has been frequently accepted by the courts of other states as an authority in support of the proposition, it is claimed, not without ground therefor, that what was there said upon the subject was not necessary to a determination of the case, and therefore *dictum*. In a Wisconsin case, *State v. Kotecki*, 155 Wis. 66, [144 N. W. 200], where it was contended that a resignation without an acceptance does not vacate an office, the court, after stating that counsel for defendant cites many cases holding the contrary, continues: "Fortunately section 962, Stats. 1911, settles the controversy. It provides: 'Every office shall become vacant on the happening of either of the following events: (1) The death of the incumbent. (2) His resignation.' So it must be held that upon the filing of the resignation of the relator the office was vacated."

Our conclusion is based not upon the authorities, concededly conflicting, bearing upon the question, but upon the fact, as declared in section 4 of the Civil Code, that "the code (sections 995 and 996, Political Code), establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects." Thus construed, we entertain no doubt that the provisions referred to gave appellant "the privilege of resignation as an absolute right, without any restrictions" (*State v. Murphy*, 30 Nev. 409, [97 Pac. 391, 720, 18 L. R. A. (N. S.) 1210]), and his resignation delivered to the officer designated (by law) to receive it, he having no duty to perform in supplying a successor, the mere receipt thereof by such officer rendered it effective and created a vacancy in the office as intended by him, immediately upon its being filed with, that is, delivered to, the clerk of the board of supervisors, which occurred several days before the time of the recall and withdrawal thereof. (*United States v. Justices of Louderdale County*, 10 Fed. 460, and cases cited.)

According to our view of the case, it is unnecessary to further review and distinguish the authorities cited by the respective parties as bearing upon the proposition submitted. Necessarily they involve the statutes of the states in which the cases arose.

By its terms the resignation was to take effect upon being filed with the clerk. No express provision is made in the law providing that a letter of resignation shall be filed, but, like documents which are required to be filed, the delivery thereof to the clerk of the board of supervisors, he being the officer designated by section 995 of the Political Code to whom the resignation should be made, constituted the filing thereof. In practice the filing of a document, so far as concerns the act of the party, consists simply in placing the paper in the hands of the clerk to be preserved and kept by him in his official custody as an archive or record of which his office is the repository, subject to such use and reference thereto as the nature of the document contemplates. While it is usual for the clerk to indorse such document, giving the date of its delivery, such file-marks are but evidence of the fact of such delivery. In *Tregambo v. Comanche M. and M. Co.*, 57 Cal. 501, it is said: "A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. . . . Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office." And in *Edwards v. Grand*, 121 Cal. 254, [53 Pac. 796], it is said: "An instrument is filed for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it." Here, there was no cause, and hence no other papers; nor is there any provision requiring the resignation to be recorded. Hence the filing was complete when it was delivered to the proper officer and by him received for the purpose for which it was intended. Neither is the alleged fact that the clerk, for purposes of his own, suppressed information that Mahoney had resigned, nor the fact that three members of the board of supervisors in calling the special meeting stated that it was for the purpose of accepting Mahoney's resignation, of any weight in determining the question, since, under the foregoing views, it is obvious that neither the clerk by his acts, nor the board of supervisors, could compel the incumbent to retain the office against his will.

Appellant cites section 879 of the Political Code, declaring that "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified," and basing his argument thereon, insists there could be no vacancy, since under the provisions of this

section appellant was required to continue in office until his successor was qualified. As well suggested by the trial judge, "counsel's argument would lead to the conclusion that there could be no vacancy until a successor was appointed, and there could be no successor appointed until there was a vacancy." While there appears to be a conflict of authority as to whether such provision as that contained in section 879 is applicable in the case of a resignation of a public officer where, to complete the same, no acceptance thereof is required, the decisions of our own supreme court seem to justify the conclusion that the provision applies not only to one whose term has expired, but as well where the incumbency is ended by resignation; the continuance in office being regarded as temporary; or, as stated in *People v. Ward*, 107 Cal. 236, [40 Pac. 538]: "He is a makeshift merely, *locum tenens*, temporarily filling a public office which it is not expedient to permit to stand vacant without an incumbent." To the same effect is *People v. Nye*, 9 Cal. App. 148, [98 Pac. 241]. Hence, conceding that one who has tendered his resignation in the mode prescribed by statute to take effect immediately, or, as here, upon the delivery of the document to the clerk, may nevertheless hold over until his successor is appointed, such fact is not inconsistent with the theory that a vacancy exists in the office to be filled by the appointing power.

For the reasons given, the judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 10, 1916.

[Crim. No. 446. Second Appellate District.—May 11, 1916.]

**THE PEOPLE, Respondent, v. PAT CAVANAUGH,  
Appellant.**

**CRIMINAL LAW—RAPE—INSTRUCTIONS—PREJUDICIAL ERROR IN REFUSING.**

In a prosecution for rape, where the testimony of the prosecutrix was conflicting as to whether a statement which she claimed the defendant made to the effect that he was an officer and was about to arrest her, was made before or after the act of intercourse, it was prejudicial error for the court to refuse to instruct the jury, at the request of the defendant, that if they found that the prosecutrix' consent to the intercourse was obtained because of her belief that the defendant was an officer and that he was about to arrest her for alleged intoxication, and not because of threats to do her great bodily injury, the defendant was entitled to an acquittal.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Walton J. Wood, Public Defender, and Graham F. Putnam, Deputy Public Defender, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**JAMES, J.**—Defendant was convicted of the crime of rape and sentenced to serve a term of fourteen years in the penitentiary. He presented a motion for a new trial, which being denied, an appeal was taken from the order and also from the judgment. The information charged that the crime was accomplished by means of force, and that the prosecutrix was prevented from resisting because of threats made by the defendant that he would kill her; that defendant exhibited a loaded revolver and pointed it at the head of the prosecutrix as an evidence of his ability to carry out his threats. The prosecutrix was a married woman and lived with her four children in the lower part of the city of Los Angeles. She testified that at the time of the alleged assault, her husband was absent in another part of the state, and that she had as a

roomer a young man who occupied a room in the upper portion of the house. She also stated that at the time of the alleged rape a lady friend was visiting her and was present in an adjoining room. She testified that she went to the door in answer to defendant's knock and that he made inquiry regarding a room, claiming that he wanted to rent one, and that after showing him through two rooms, and while in one of the bedrooms, defendant caught her by the arm, drew a revolver, and threatened to shoot her if she made any outcry and did not consent to his proposal; that he forced her over upon a bed and thereupon had sexual intercourse with her. She further testified that after the act had been accomplished she went into the kitchen; that he came with her and that while she was busy about her toilet he talked to her. She further testified that defendant claimed to be an officer, and said that he had been sent by the chief of police to arrest the prosecutrix for intoxication. She further testified that defendant returned twice that day, once in the early part of the evening, and the last time at about 11 o'clock that night. She stated that she made no immediate complaint to anyone regarding the conduct of the defendant, and on the occasion of each of his later visits she admitted him into the house and talked with him. Her excuse for so doing was that she believed that he was an officer and would make trouble for her if she did not. At the time of his arrest it was found that defendant did have some sort of a star, such we assume as might be worn by an officer, and that he had carried a revolver.

When this case was first considered an opinion was written ordering that the judgment and order be affirmed. Upon application thereafter made, a rehearing was granted. One of the chief errors claimed to have been committed by the trial court was in refusing to give an instruction offered by the defendant, advising the jury that if they found that the prosecutrix' consent to the intercourse was obtained because of her belief that the man was an officer and would arrest her, and not because of the threats to do her great bodily injury, defendant was entitled to an acquittal. Treating of that point in our former opinion, we said: "No fault can be found with this instruction as to the correctness of the law announced therein, but the evidence was such as to authorize the court to refuse it. The testimony of the prosecutrix was

that no statement was made by appellant prior to the completion of the act of intercourse to the effect that he was an officer, but all of that was said afterwards. . . . Had the testimony shown that before or at the time the assault was committed, one of the threats made by appellant had been that he would or was about to arrest the prosecutrix, then the instruction would have been pertinent and timely and we think it would have been error to refuse it." We have re-examined the testimony given by the prosecutrix. As stated in the former opinion, she did finally say that the alleged statements made by the defendant, to the effect that he was an officer and would arrest her, were made after the intercourse had been had. It is insisted, however, that, inasmuch as the witness at first stated that the defendant made his claim of being an officer and his threat of arrest at the time the witness alleged he pulled the gun and before the intercourse occurred, notwithstanding that she contradicted this finally, it was a matter for the jury to say and determine as to which of her statements they would believe. We are inclined to adopt this view as being the correct one to be taken, and with that conclusion in mind, it appears clear that the instruction offered by the appellant should have been given. And we think the error was prejudicial. The general statement of the prosecutrix showed marks of improbability. It is hardly consistent with the attitude of a woman who has been, at the point of a revolver, compelled to submit to the embraces of an assailant, that no complaint should have immediately been made, and that twice on the same day the prosecutrix should have admitted the same man to her house and there conversed with him. An occurrence such as the prosecutrix described would most naturally seem to call for immediate complaint and the denunciation of the perpetrator at the earliest possible moment. All of these reflections give color to the claim of the public defender, who appeared for the defendant in this case at the trial, that the prosecutrix did consent to the act of intercourse under the belief that Cavanaugh was a peace officer and for the purpose of purchasing immunity from arrest or molestation by him. The mere threat to arrest her would not be a threat to use such force and violence as are described in section 261 of the Penal Code. Defendant on his part admitted that the act of intercourse had taken place between him and the prosecutrix, and

testified that the prosecutrix might have inferred that he was an officer; that he went to her house at the request of a relative of hers to endeavor to persuade her not to continue her drinking habits, and that she placed her arms around his neck, and told him not to say anything about it, and she would do better and would consent to anything he wanted, and that thereupon she voluntarily offered to have intercourse with him. It would seem natural that the jury would condemn the attitude adopted by the defendant in allowing the prosecutrix to assume that he was an officer, if they so believed, and in that state of the case it became important to the defendant to have the jury fully advised that he could not be convicted of the crime charged solely because of any belief on the part of the prosecutrix that he was an officer and would arrest her unless she gave her consent to the act.

In their general substance the instructions as given by the trial judge appear to have correctly stated the law. We think that because of the one error specified, however, that the appellant is entitled to a new trial.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

---

[Crim. No. 472. Second Appellate District.—May 11, 1916.]

THE PEOPLE, Respondent, v. J. R. McLEOD, Appellant.

**CRIMINAL LAW—PERJURY—FALSE STATEMENT IN ANSWER—AUTHORITY OF NOTARY.**—In a prosecution for perjury based upon an alleged false statement in a verified answer in a civil suit, the defense that the notary who took the affidavit was not shown to be qualified because it was not proven that he had given the bond required by law, although his commission and oath of office were introduced in evidence, cannot be maintained, as his act in administering the oath would be valid as the act of a *de facto* officer.

**Id.—PROOF OF SIGNATURE.**—The testimony of the notary that he had seen the defendant write, and that in his opinion the signature attached to the affidavit in question was that of the defendant, was sufficient proof of the genuineness of the signature; and the certificate of the notary—that is the *jurat* attached to the affidavit—was also sufficient to furnish *prima facie* evidence of the making

of the affidavit in the manner charged, the notary's act being authenticated by his official seal.

**ID.—ARGUMENT OF DISTRICT ATTORNEY—STATEMENT THAT EVIDENCE OF PROSECUTION IS UNCONTRADICTED.**—In a prosecution for perjury it is not misconduct on the part of the district attorney in his argument to state that the testimony of the chief witness for the prosecution is uncontradicted, he also stating that the defendant was not compelled to take the stand, where there had been no evidence offered in defense.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Ralph F. Graham, and Russell Graham, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**JAMES, J.**—Appellant was convicted of the crime of perjury. An appeal is taken from the judgment of imprisonment and from the order denying a motion for a new trial. The alleged false statements appeared in an answer filed by appellant to a complaint in a civil action then pending against him in the superior court of Los Angeles County. This answer bore an affidavit of verification in the usual form from which it appeared that the defendant there, this appellant, made oath to the same on the first day of May, 1914, before Fred W. Heatherly, a notary public in and for the county of Los Angeles. It is first claimed that there was no sufficient proof that Heatherly at the time the oath was administered was a qualified notary public. Heatherly was called as a witness. The question was asked him as to whether he was at the time specified in the affidavit a notary public, to which question an objection was sustained. Whereupon the commission issued by the Governor of the state appointing the said Heatherly as a notary public, which commission was dated April 26, 1913, was introduced in evidence. There was also introduced in evidence the record of the county clerk of Los Angeles County showing that Heatherly had taken and subscribed the oath of office in due form. The fault

found with this proof was that no showing was made that the notary had ever given the bond required by the statute. The absence of this proof we do not think was available to sustain the point made by the appellant, for the reason that, assuming that no such bond was given, the acts of Heatherly would be valid as the acts of a *de facto* officer. It has been so expressly held in other jurisdictions. (*Keeney v. Leas and Lyon*, 14 Iowa, 464.) The question there arose as to the admissibility of depositions taken before a notary before he had performed all the acts of qualification after appointment. The depositions were ruled out by the trial court, which ruling was reversed on appeal, and it was held that the notary as a *de facto* officer was authorized to take depositions. To be sure, it is remarked in that case that the court did not determine whether the witnesses whose depositions were taken could for false swearing be convicted of perjury. That such a conviction would necessarily be sustained seems plain; otherwise no validity could be attached to the acts of the notary *de facto*. The depositions were admissible as statements made under oath, or they were not admissible at all. A case not direct to this point, but of incidental argumentative weight, is that of *Reavis v. Cowell*, 56 Cal. 588.

Further objection is made that there was no sufficient proof as to the signature of appellant to the affidavit of verification, or as to his having taken the oath certified by the notary. It appeared by Heatherly's testimony that he was the attorney for appellant in the particular action in which the verified answer referred to was filed. Heatherly was indeed vague in his statements as to what transpired upon the taking of the verification of the answer. He stated that he had no independent recollection of the facts, and that the presence of his certificate and signature were the only matters which suggested to him any connection with the transaction. He did, however, state that he had seen the appellant write, and gave it as his belief, or opinion, that the signature attached to the affidavit was that of this appellant. That testimony, we think, aside from the weight to be given to the certificate itself, was sufficient to furnish some evidence of the fact that appellant subscribed the affidavit. (Code Civ. Proc., sec. 1943.) And we think further that the certificate of the notary—that is, the *jurat* attached to the affidavit—was sufficient to furnish *prima facie* evidence of the making

of the affidavit by McLeod, in the manner charged. (*Baldwin v. Bornheimer*, 48 Cal. 433.) The acts of a notary public authenticated by his official seal, as was the affidavit in this case, when performed within the line of the duties appertaining to his office, are accepted as first instance proof by the courts and, unless contradicted, may be sufficient. There was no evidence offered on the part of defendant tending to prove that he did not make the affidavit and take the oath as the notary's certificate gave evidence of. The fact that it was shown without dispute and sufficiently that the notary was the attorney for the appellant in that case, and that the verified answer was filed and used therein, were circumstances which were of some corroborative value in making out proof of those elements of the charge which have hereinbefore been discussed.

As to the sufficiency of the evidence going to show the falsity of the matters set out in the verified answer, we are satisfied that the proof was such as to authorize a verdict of guilty. There was evidence, both direct and circumstantial, which furnishes support to all of the conclusions which the jury was required to make before returning the verdict which it did.

It is claimed that the district attorney in his argument to the jury transcended a right of the defendant when he made reference to the fact that no evidence had been introduced in opposition to that furnished by the prosecution. Herein it is claimed that as the defendant was not compelled to be a witness, any reference to that fact by the prosecutor in argument was prejudicial to his right to a fair trial. The remark objected to consisted of this statement by the deputy district attorney: "Mr. Brennan's [referring to the chief witness for the prosecution] statement is uncontradicted. The defendant does not have to take the stand." The district attorney was perfectly justified in his assertion that the testimony of the prosecution was uncontradicted, for there had been no evidence offered in defense. His further statement that the defendant was not obliged to take the stand on his own behalf was merely a declaration as to the law and was favorable to the defendant. Furthermore, at the defendant's own request, the court gave an instruction to the jury which embodied this statement: "The defendant is not required to prove his inno-

cence, nor is he required to take the stand as a witness himself, unless he desires so to do. . . ."

An examination of the record and of the points urged by counsel for the appellant does not disclose any error which warrants a judgment of reversal.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1484. First Appellate District.—May 11, 1916.]

**E. J. BLOSSOM, Appellant, v. C. W. WALLER, Respondent.**

**CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.**

A motion for a change of venue grounded upon the convenience of witnesses rests in the discretion of the trial court, the exercise of which will not be disturbed in the absence of a showing of its abuse; and it is settled that a mere preponderance in the number of witnesses claimed to be necessary to the moving party, does not entirely control the exercise of the court's discretion; regard may be given to the character of the proposed testimony, and the court may therefore determine for itself from the showing made whether or not there be any necessity for the testimony of any or all of the desired witnesses.

**Id.—OPPOSITION TO MOTION—STIPULATION AS TO FACTS.**—Stipulations admitting facts alleged in the pleadings may properly be received in opposition to a motion for change of venue made upon the ground of the convenience of witnesses, and where a stipulation in a case has the effect of eliminating the defendant's cause of action for damages, as pleaded in his cross-complaint, and consequently the plaintiff would not have been put to the necessity of producing witnesses to testify in his behalf upon that phase of the case, there is no abuse of discretion in denying plaintiff's motion for a change of venue in so far as the order made involved the issues raised by the cross-complaint.

**Id.—ISSUES MADE BY COMPLAINT AND ANSWER—TESTIMONY OF PLAINTIFF AND DEFENDANT ONLY NECESSARY—PROPER DENIAL OF MOTION.** On a motion for a change of venue made by the plaintiff on the ground of convenience of witnesses, where a stipulation of the defendant admitted facts set up in the cross-complaint which, in effect, eliminated the issues raised therein, and it appeared that the issues raised by the complaint and answer depended largely upon the testimony of plaintiff and defendant alone, between whom the

convenience of attending the trial would not be a factor, and it did not appear that the showing made on behalf of plaintiff compels the conclusion that the greater convenience of the witnesses generally would be served by a trial of the action in the county of plaintiff's residence, the ruling of the trial court denying the motion will not be disturbed on appeal.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco denying a motion for a change of place of trial. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

**J. T. Matlock, Jr., and W. W. Bedford, for Appellant.**

**Sterling Carr, and McCoy & Gans, for Respondent.**

**LENNON, P. J.**—This action for damages for an alleged breach of contract was instituted in the superior court of Tehama County. The defendant's motion for a change of venue to the city and county of San Francisco, the place of his residence at the time of the commencement of the action, was granted. The defendant answering, denied all of the material allegations of the plaintiff's complaint, and, cross-complaining, prayed for damages claimed to have been suffered by him because of the plaintiff's failure to keep the terms of the contract imposed upon him. In due course plaintiff made a motion that the action be transferred to the superior court of Tehama County for trial upon the ground of the convenience of witnesses, supporting the motion by his own affidavit. Therein the plaintiff set forth the names of certain witnesses residing in or in the vicinity of Tehama County, and averred that it was his intention to call them as witnesses in his behalf, and that they would testify in a particular way to certain matters and things which apparently were material and relevant only to the issues raised by the defendant's cross-complaint. In reply the defendant filed his affidavit denying generally all the material averments of the plaintiff's affidavit, and in particular denying that the parties named as prospective witnesses for the plaintiff would testify in his favor, as stated in his affidavit. The affidavit of the defendant showed further that in support of his case he would rely upon the testimony of several witnesses to material matters

who resided in San Francisco. The defendant also filed affidavits by several persons, upon whom the plaintiff claimed to rely for testimony favorable to him, to the effect that they had not been spoken to by the plaintiff upon the subject of the controversy in suit and would not testify as stated in his affidavit, but, on the contrary, would testify to facts favorable to the defendant. The defendant also presented the affidavit of a third person which tended to show that the remaining witnesses designated in the affidavit of the plaintiff, and relied upon by him for testimony favorable to his side of the case, either upon the issues raised by the pleadings generally, or those raised by the cross-complaint, had not been approached by the plaintiff, and would not testify as he had expected. Supplementing these affidavits the defendant offered, and there was received in evidence upon the hearing of the motion, his written stipulation which, upon the condition that the action be tried in the superior court of the city and county of San Francisco, admitted as true certain facts involved in the issues raised by the cross-complaint. The defendant at the same time offered to stipulate and admit that a certain fact upon which he relied in support of one item of his damage resulting from the plaintiff's alleged breach of the contract, did not exist as it was pleaded in his cross-complaint. To the showing thus made by the defendant the plaintiff made no reply. The motion was denied, and the appeal is from the order thus made.

A motion for a change of venue grounded upon the convenience of witnesses rests in the discretion of the trial court, the exercise of which will not be disturbed in the absence of a showing of its abuse; and it is settled that a mere preponderance in the number of the witnesses claimed to be necessary to the moving party does not entirely control the exercise of the court's discretion. Regard may be given to the character of the proposed testimony; and the court may therefore determine for itself from the showing made whether or not there be any necessity for the testimony of any or all of the desired witnesses. (*Tait v. Midway etc. Oil Co.*, 28 Cal. App. 107, [151 Pac. 378]; *Pascoe v. Baker*, 158 Cal. 232, [110 Pac. 815]; *Bird v. Utica etc. Co.*, 2 Cal. App. 672, [86 Pac. 509].) Stipulations of the character proposed in the present case may properly be received in opposition to a motion for a change of venue made upon the ground of the convenience of

witnesses. The stipulations of the defendant, if accepted, would in effect have eliminated the defendant's cause of action for damages as pleaded in his cross-complaint, and consequently the plaintiff would not have been put to the necessity of producing witnesses to testify in his behalf upon that phase of the case. This being so, it cannot be said that the trial court abused its discretion in so far as the order made involved the issues raised by the cross-complaint. (*Schilling v. Buhne*, 139 Cal. 611, [73 Pac. 431]; *Stockton Combined Harvester etc. Works v. Houser*, 103 Cal. 377, [37 Pac. 179]; *Miller & Lux v. Kern County Land Co.*, 140 Cal. 132, [73 Pac. 836].)

With the issues raised by the cross-complaint eliminated there would have remained for determination only the issues raised by the complaint and the answer; and upon an analysis of the showing made for and against the motion it is apparent to us that the determination of the latter issues would depend largely upon the testimony of the plaintiff and defendant. As between these the inconvenience of attending the trial would not be a factor; and in so far as the testimony of other witnesses might be necessary to the determination of those issues, we are not satisfied that the showing made upon behalf of the plaintiff compels the conclusion that the greater convenience of the witnesses generally would be served by a trial of the action in the county of the plaintiff's residence.

The order appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

---

[Crim. No. 353. Third Appellate District.—May 12, 1916.]

In the Matter of the Application of EDWARD LONG, for a Writ of Habeas Corpus.

**HABEAS CORPUS—JUDGMENT—JURISDICTION OF COURT—ADMISSIBILITY OF RECORDS.**—On a hearing under a writ of *habeas corpus*, the records of the proceedings of the court rendering the judgment, under which the petitioner is held by the sheriff, at the time of pronouncement of judgment, may be considered for the purpose of ascertaining whether the judgment was or was not one which the court had jurisdiction to render against the accused.

**ID.—OFFICE OF WRIT OF HABEAS CORPUS.**—The single question submitted by a proceeding in *habeas corpus* is always one of jurisdiction, and if it appears that it was within the lawful jurisdiction of the court or tribunal to do the act or pronounce the judgment assailed through such a proceeding, then the inquiry is at an end, even though it be made to appear that the court or the tribunal in doing the act or pronouncing the judgment committed irregularities or errors which, on appeal, might be held sufficient to vitiate the act or judgment.

**ID.—POWER OF COURT TO CORRECT JUDGMENT.**—Where a court has pronounced an illegal judgment, or a judgment illegally, in a case of which it has jurisdiction under the law, such court may thereafter and before execution of such judgment is commenced, set the same aside and pronounce a legal judgment, or a judgment in conformity with the requirements of the law.

**ID.—ILLEGAL SALE OF LIQUOR—JUDGMENT—IRREGULARITY IN—WHEN NOT SUBJECT TO ATTACK ON HABEAS CORPUS.**—A party who has been convicted of selling alcoholic liquors in no-license territory, and first sentenced to imprisonment in the county jail for the term of ninety days and immediately delivered to the custody of the sheriff, cannot be discharged on *habeas corpus* upon the expiration of such term upon the ground that the day after such judgment was pronounced a second judgment sentencing the defendant to imprisonment in the county jail for the term of five months was rendered, there being no showing that the first judgment was not illegal in substance or form, and it not being shown that a certified copy of the first judgment was furnished to the sheriff under which he held the prisoner.

**APPLICATION** for a Writ of Habeas Corpus originally made to the District Court of Appeal, for the Third Appellate District, directed to the Sheriff of Solano County.

The facts are stated in the opinion of the court.

Paul C. Harlan, for Petitioner.

Arthur Lindauer, for Respondent.

**HART, J.**—The petitioner claims that he is unlawfully restrained of his liberty by the sheriff of Solano County, and asks that he be released from such restraint through the writ of *habeas corpus*.

Because of the absence of the other justices of this court, the writ was made returnable before me.

The general contention is that the said sheriff is holding the petitioner in his custody and in confinement in the county jail of the county named under a commitment based on a void judgment.

The petition alleges that the petitioner was, on the seventeenth day of January, 1916, regularly sentenced by the superior court in and for the county of Solano, to imprisonment in the county jail of said county for the term of ninety days for selling alcoholic liquor within no-license territory in said county; that, immediately upon being sentenced, the petitioner was delivered to the custody of the sheriff of said county and by him was confined in the county jail under said judgment or sentence; that "said sentence commenced to run and said Edward Long commenced to serve and undergo said sentence on said January 17, 1916, and has been continuously ever since said January 17, 1916, and is now, imprisoned and confined in said county jail; that said Edward Long has served more than the said ninety days' sentence, and is now, and has been, ever since April 17, 1916, restrained of his liberty by said sheriff as aforesaid, in said county jail, without legal warrant or excuse or authority." The return of the sheriff to the writ consists of the commitment upon which he holds the petitioner in custody, and which is a duly certified copy of the judgment rendered and entered against the petitioner by the superior court of Solano County. Said commitment, after setting forth the title of the court and cause, and designating the offense of which the petitioner was by the information accused, recites: "The district attorney, with the defendant, came into court. The defendant was duly informed by the Court of the nature of the information filed on the 17th day of January, 1916, charging him with the crime of selling liquor in No-license Territory, committed on the 11th day of January, 1916, of his arraignment and plea of guilty as charged. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment: That, whereas, the said Edward Long, having been duly convicted in this Court of the crime of selling liquor in No-License Territory, it is, therefore, ordered, adjudged and decreed that the said Edward Long be punished by imprisonment in the county jail of Solano County



for the term of five months and that he pay a fine of one hundred dollars. The defendant was then remanded to the Sheriff of Solano County to be by him so imprisoned."

The return was not formally traversed or controverted or demurred to. The petitioner, however, filed and introduced in evidence a certified copy of certain entries made by the clerk of the trial court in the criminal register of said court, disclosing that a judgment of imprisonment for ninety days in the county jail of Solano County, and a fine of fifty dollars, had been pronounced against the petitioner prior to the time at which the judgment under which he is now undergoing punishment was pronounced.

At the hearing before me, evidence, oral and documentary, relating to the proceedings involving the rendition of both the first and second judgments, was offered and objected to by the district attorney of Solano County, representing the respondent, and by the attorney for the petitioner. These objections (by the district attorney) were based upon the ground that a judgment in a criminal case, valid on its face, cannot, in a collateral proceeding, be impeached by evidence *de hors* the judgment or the record itself.

My conclusion is that the record of the proceedings as made in the court below at the time of the pronouncement of judgment may be considered for the purpose of ascertaining whether the judgment under which the petitioner is now being held was or was not one which the court had jurisdiction to render against the accused. (*Ex parte Dela*, 25 Nev. 346, [83 Am. St. Rep. 603, 60 Pac. 217], and cases therein cited.)

The offense to which the petitioner pleaded guilty, and for which he is now undergoing the imprisonment of which he here complains, consisted of his violation of the local option law passed by the legislature of 1911. (Stats. 1911, p. 599.)

Section 19 of said act prescribes the following penalties for the violation of the provisions thereof:

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding six hundred dollars, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment; but any person found guilty of violating any of the provisions of this act, by conviction for an offense committed after a previous conviction under this act, shall be punished by a fine not

exceeding six hundred dollars nor less than one hundred dollars, and by imprisonment in the county jail not exceeding seven months, nor less than one month."

It will be observed that, by the foregoing section, the court is authorized to impose a heavier penalty in the case of a prior conviction of the accused of the crime of violating the provisions of said statute.

The specific contention of the petitioner is: 1. That, since there is no allegation in the information of a prior conviction of the petitioner of an offense against the statute in question, the court was without jurisdiction to pronounce against him a sentence conformably to the theory of a prior conviction. 2. That, when the court, on the seventeenth day of January, rendered judgment against the petitioner, and the latter thereupon delivered over to the sheriff to be by that officer confined in the county jail in execution of said judgment, the court then and thereupon lost all further jurisdiction of the case, and, therefore, exceeded its jurisdiction in setting aside the said judgment and pronouncing another and different judgment; that the later judgment is, consequently, absolutely void.

The proceeding before me as it now stands is: That the return made to the writ, showing the authority of the sheriff for holding the prisoner, contains a duly certified copy of the judgment, whereby the petitioner was, on the eighteenth day of January, 1916, sentenced to imprisonment in the county jail of Solano County for the term of five months and to pay a fine of one hundred dollars; that to overcome or countervail the effect of said judgment, the petitioner has presented, not a certified copy of another and different judgment for the same offense, but the record of entries in the criminal register of the trial court showing that on the seventeenth day of January, 1916, the petitioner had been sentenced to imprisonment for a term of three months and to pay a fine of fifty dollars for (presumably) the same offense.

The single question submitted by a proceeding in *habeas corpus* is always one of jurisdiction. If it appears that it was within the lawful jurisdiction of the court or tribunal to do the act or pronounce the judgment assailed through such a proceeding, then the inquiry is at an end, even though it be made to appear that the court or the tribunal in doing the act or pronouncing the judgment committed irregularities or

errors which, on appeal, might be held sufficient to vitiate the act or judgment.

It will not for a moment be doubted that the court had jurisdiction to pronounce such a judgment as the one here complained of under the statute upon which the information filed against the petitioner is founded. Nor will it be doubted that, where a court has pronounced an illegal judgment, or a judgment illegally, in a case of which it has jurisdiction under the law, such court may thereafter and before execution of such judgment is commenced, set the same aside and pronounce a legal judgment, or a judgment in conformity to the requirements of the law. (*Ex parte Gilmore*, 71 Cal. 624, [12 Pac. 800]; *Matter of Robbins*, 27 Cal. App. 677, [151 Pac. 14].) Neither the return to the writ, nor the record in the case as certified by the clerk of the court below and presented as in answer to the return, discloses the reason for the making of the order vacating the purported judgment first rendered, and, therefore, it has not been made affirmatively to appear from the return or the answer thereto, nor, indeed, by any of the records of the case as presented here, whether the court had, in pronouncing the first judgment, exhausted its jurisdiction in this particular case so that it was without authority to set it aside and pronounce the second judgment. It does not affirmatively appear that, upon the rendition of the first judgment, or at any time, a certified copy of said judgment was furnished the sheriff, which certified copy is the sole warrant or authority necessary to justify or require the execution thereof by the sheriff. As has been shown, it is merely made to appear in the proceeding before me, that the sheriff holds the prisoner on a commitment which, on its face, is valid and *prima facie* legal and sufficient to warrant the officer in restraining the petitioner; that the petitioner, in attempting to discharge the burden resting upon him to impeach the *prima facie* showing so made, introduced the entries in the register of criminal cases showing the previous judgment. I cannot perceive how the showing thus made by the petitioner can in a *habeas corpus* proceeding be held to be sufficient to disclose that the court had been divested of jurisdiction to pronounce the judgment last rendered. In other words, I cannot say upon the showing made by the petitioner in impeachment of the commitment by authority of which the sheriff now detains him, is such as to require the latter to be disregarded or held

to be illegal and invalid. (*Ex parte Williams*, 89 Cal. 421, 425, [26 Pac. 887].)

While it is true, as stated, that upon the record of the case itself, the reason for the setting aside of the judgment pronounced on January 17th does not appear, it was nevertheless otherwise disclosed in this proceeding. The district attorney offered in evidence the stenographer's report of the proceedings in *habeas corpus* in this case before the superior court of Solano County, the petitioner having thus attempted to secure his discharge from custody after he had served a term of three months in the county jail. While I do not regard the evidence so offered as material or important to the determination of the issue presented here which involves, obviously, the single question whether the judgment herein and hereby assailed was within the jurisdiction of the court to impose, I shall briefly rehearse the facts as so disclosed, assuming them to be the admitted facts of the matter, since the evidence showing them was offered by the respondent and not denied by the petitioner.

It appears from the said report of the stenographer that the petitioner was arraigned, pleaded guilty, and was sentenced late on the afternoon of the seventeenth day of January, and just about the time for the adjournment of the court for the day. After the case was disposed of, the judge and the county clerk left the courthouse together, and the conversation between them turned on the petitioner's case. The clerk asked the judge what sentence he had imposed, and, upon being informed by the judge of the extent of the punishment, the clerk suggested that the petitioner had once before been convicted of violating the same statute and stated that he could, therefore, not understand how the sentence, so far as the fine was concerned, could be less than one hundred dollars. The judge replied that the matter had been rushed through and that he had not had time to consider the provision of the statute as to a second conviction; that he would on the following morning set aside the judgment which he had pronounced and render a judgment in accordance with the fact of the petitioner's previous conviction. It was further made to appear that, prior and up to the time of his arraignment and plea of guilty on the 17th, the petitioner had been in the custody of the sheriff and confined in the county jail awaiting trial upon the charge to which he on that day pleaded guilty; that upon said judgment being pronounced, the sheriff imme-

diately returned the prisoner to the county jail, said officer, as seen, having been furnished no certified copy of the said judgment as his authority for holding him under said judgment.

Conceding the above to be a true history of the proceedings involving the pronouncement and the setting aside of the first judgment and the rendition of the second judgment, still there is nothing therein from which it may be said that the court went beyond its power, legally, in setting aside the first judgment or acted in excess of its jurisdiction in pronouncing the second judgment. It is not made to appear by that evidence that the first judgment was not illegal in substance or form, and if the first judgment was illegal, the purported sentence thereunder could not begin to run upon the confinement of the petitioner in the county jail under such judgment, nor, indeed, could it legally begin to run at all.

While it is the claim, and it may be true, that the second judgment was pronounced upon the theory of a prior conviction of the petitioner of a similar offense, it is also true that the penalty imposed by the court by its second judgment is one which may legally be inflicted where the accused has not been convicted of previously violating the local option law. And it cannot be told from the judgment or the record itself of the proceedings in the court below involving the sentencing of the petitioner whether the judgment was based upon a first conviction only, or upon a conviction and a prior conviction of a violation of the statute. The fact that it might have been based upon the theory of a second conviction is made to appear only, as has been shown, by the stenographer's report of the proceedings in *habeas corpus* before the superior court after the petitioner had served ninety days of his sentence. But, conceding that the sentence was based on the provision of section 19 as to a prior conviction, still the jurisdiction of the court to pronounce the second judgment is not impeached by anything disclosed by the record before me.

It is true that the information does not charge a prior conviction under the local option law. Nor is it made to appear that the court, before pronouncing judgment, received evidence showing a prior conviction of the petitioner. But, assuming that, to have authorized the court to impose a penalty according to the fact of a prior conviction, it was essential that such prior conviction should have been pleaded and

proved, or at the least proved, yet omission to plead the fact, if it was necessary to do so, or failure in any event to prove it, could not affect the jurisdiction of the court to pronounce the judgment, but would merely constitute an error or irregularity which would not render the judgment absolutely void, or subject it to annulment otherwise than through an appeal supported by a duly authenticated record disclosing the error or irregularity. (*Ex parte Max*, 44 Cal. 579, 581.)

My conclusion is, as must be manifest from the foregoing discussion, that want of jurisdiction in the court to pronounce the judgment challenged by this proceeding has not been shown.

The writ is, therefore, discharged and the petitioner remanded.

---

[Civ. No. 1837. First Appellate District.—May 12, 1916.]

W. S. VAN COTT, Respondent, v. MARSHALL A. FRANK,  
Appellant.

**NEW TRIAL—STATEMENT OF CASE—FAILURE TO PRESENT IN TIME—MOTION FOR RELIEF—LACK OF JURISDICTION.**—Where a default in presenting a proposed statement on motion for a new trial, with the amendments thereto, has continued for a period of more than six months after the time prescribed by section 650 of the Code of Civil Procedure within which such papers must be presented, the trial court has no jurisdiction to relieve the party from the default.

**Id.—CONSTRUCTION OF SECTION 473, CODE OF CIVIL PROCEDURE.**—Section 473 of the Code of Civil Procedure applies to defaults in presenting a statement of the case on motion for new trial, and limits the time within which application may be made for relief therefrom to six months from the time of default.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco dismissing defendant's motion for a new trial, and from an order refusing to relieve the defendant from his default in not having presented his bill of exceptions or statement of the case within the time provided by law. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

**Samuel Rosenheim, and H. B. M. Miller, for Appellant.**

**George F. Hatton, Hartley F. Peart, and Gus L. Baraty,  
for Respondent.**

**RICHARDS, J.**—There are two appeals presented in this record—one from an order of the trial court dismissing the defendant's motion for a new trial upon the ground that no bill of exceptions or statement of the case had been presented or settled; and the other from an order of the court refusing to relieve the defendant from his default in not having presented such bill of exceptions or statement of the case within the time required by law.

The facts as disclosed by the record are these: On August 20, 1912, judgment was entered in plaintiff's favor. Thereafter and on August 28, 1912, the defendant served and filed his notice of intention to move for a new trial, and on December, 1912, duly served upon the plaintiff his proposed statement on motion for a new trial. On September 4, 1913, to which date his time had been duly extended, the plaintiff served upon the defendant his proposed amendments to said statement. Nothing further was done in the matter until March 17, 1914, when the plaintiff served and filed a notice of motion to dismiss the defendant's motion for a new trial upon the ground that the proposed statement and amendments thereto had not been presented for settlement within the time required by law. The defendant appeared in resistance to said motion, presenting certain affidavits excusing his delay, and also and a few days later served and filed a motion for relief from his default and from the plaintiff's motion to dismiss predicated thereon, basing his said motion for relief upon the affidavits already on file. The court refused to grant this latter motion upon the sole ground that it had no jurisdiction to consider it; and thereupon granted the plaintiff's motion to dismiss defendant's motion for a new trial upon the grounds stated.

The appellant contends that the trial court was in error in holding that it had no jurisdiction to grant the defendant's motion for relief under section 473 of the Code of Civil Procedure; and in that behalf he urges that the proceedings against which he was seeking relief was that of the plaintiff's motion to dismiss the defendant's appeal. But we cannot



accept this view; for, conceding that the defendant's uncontradicted affidavits furnished a sufficient excuse for delay in not presenting his statement and the amendments thereto for settlement within the time required by law, still it was his default in not having done so that he was seeking to excuse and obviate by his affidavits and motion; and since that default had continued for a period of more than six months after the time prescribed by section 650 of the Code of Civil Procedure within which such papers must be presented, the trial court could not grant the relief sought by said motion. This court has held in a number of well-considered cases that section 473 of the Code of Civil Procedure, applies to such defaults, and limits the time within which application may be made for relief therefrom to six months from the time of the default; and that after the expiration of such time limit the court has no jurisdiction to grant such relief (*Steen v. Santa Clara Valley M. & L. Co.*, 4 Cal. App. 448, [88 Pac. 499]; *Howse v. Norwich etc. Fire Ins. Co.*, 10 Cal. App. 712, [103 Pac. 156]; *Harbaugh v. Lassen Irrigation Co.*, 24 Cal. App. 773, [142 Pac. 847]).

It follows that the court was not in error in refusing to grant the motion for the defendant for relief against his default; and it therefore necessarily follows that the court was justified in dismissing the defendant's motion for a new trial.

The orders appealed from are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 10, 1916.

---

[Civ. No. 1488. Third Appellate District.—May 15, 1916.]

JONAH MOORE et al., Respondents, v. O. B. LAUFF,  
Appellant.

**PROMISSORY NOTE — DISTRIBUTION TO LEGATEES — RIGHT TO SUE ON JOINTLY.**—Where a promissory note, among other assets of the estate of a deceased person, is distributed to the legatees jointly, the latter may jointly sue upon it without first having their respective shares therein partitioned and assigned to them under section 1675

of the Code of Civil Procedure, as it is not compulsory on them under this section to ask for a partition of their interests in severalty.

**APPEAL** from a judgment of the Superior Court of Del Norte County. John L. Childs, Judge.

The facts are stated in the opinion of the court.

George W. Howe, for Appellant.

Miller & Payton, for Respondent.

**HART, J.**—This is an appeal from the judgment, on the judgment-roll alone, by the defendant, Lauff.

The action was on a promissory note for five hundred dollars, dated February 15, 1912, which note (the complaint alleges) was made and delivered by the defendants to one S. A. Moore on the day of its date.

The complaint further alleges that Moore died testate on the eighth day of March, 1912, leaving estate, among the assets of which was the note in suit; that Jonah Moore, one of the plaintiffs, was thereafter, on due proceedings, appointed executor of the estate of the deceased, and letters testamentary issued to him, and that he qualified as such executor. The complaint proceeds: "That thereafter such proceedings were had in the matter of the said estate that on the 10th day of April, 1913, there was made and entered in said superior court, in the matter of the estate of S. A. Moore, deceased, a final decree of distribution of the effects of said estate and among which effects was the said promissory note, herein declared upon, and which said note was by said decree of distribution, distributed share and share alike to the several beneficiaries named in the said last will and testament of the said S. A. Moore, deceased. That each of the said beneficiaries, so named in said will, and to whom distribution was so made as aforesaid, had at the time of said distribution, attained to his or her majority. That subsequently to said decree of distribution, the several distributees partitioned and divided, equitable among themselves, the effects of the said estate so distributed; and that by said partition and division the said promissory note herein declared upon became the property of these plaintiffs jointly, and

they are now the owners and holders thereof." The complaint was unverified.

The defendants interposed a general demurrer to the complaint. The demurrer was overruled, and, answering the complaint, the defendants denied that the note declared upon was on the date mentioned or at any other time delivered to said Moore and denied that the plaintiffs "are now or ever were at any time whatever the owners or holders of said promissory note."

The appellant contends that the complaint does not state a cause of action, and that his general demurrer should have been sustained. In purported support of this contention, he declares that the complaint is wholly wanting in the statement of a cause of action on the note sued on because it appears therefrom that, after the court made its decree of distribution, whereby the property of the estate was distributed to the several beneficiaries share and share alike, the latter being thus vested with undivided interests in common in the property, the distributees themselves "partitioned and divided the effects of the said estate so distributed," thus arrogating to themselves and exercising the right to perform an act which is solely within the power of the probate court and which "can be accomplished only by the court"; whereas, so the argument runs, to vest them with ownership of the note, so that they would be legally entitled to maintain an action thereon, it was necessary that said note, with the other assets of the estate, should first have been partitioned and the respective shares of the beneficiaries assigned to them in accordance with section 1675 of the Code of Civil Procedure. That section provides:

"When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court. . . ."

The point is entirely destitute of merit.

In the first place, it is to be remarked that the criticism so directed against the complaint involves an objection, not to the sufficiency of that pleading to state a cause of action, but to the legal capacity of the plaintiffs to maintain the action or sue upon the obligation pleaded, and such an objection

cannot be raised by a general demurrer. (Code Civ. Proc., secs. 430, 431.) In the second place, assuming that the question could thus be raised and is so presented, the fact that their respective interests in the note had not been separated and vested in them severally, could not have the effect legally of foreclosing their right to join in an action to enforce the collection thereof. Indeed, their respective several interests being undivided, it was their duty to join in a suit to recover on the note (Code Civ. Proc., sec. 378), and had they not done so, the action having been instituted by one of the beneficiaries only, the court could, upon a showing that it was necessary to a full and complete adjudication of the controversy according to the facts, require the other beneficiaries or legatees to be joined as parties plaintiff or even as defendants, if they refused to be joined as plaintiffs. (Code Civ. Proc., sec. 382.) Thirdly, the appellant's proposition necessarily assumes that under section 1675 it is compulsory upon the heirs, devisees, or legatees to whom has been assigned by a decree of distribution an estate in common and undivided and in which their respective shares have not been separated and identified, to ask for the partition of the estate by commissioners appointed by the court for that purpose, and for the distribution to them in severalty of their respective interests as thus ascertained and determined. But the assumption is obviously erroneous. The proceeding contemplated by said section is one the institution of which rests wholly in the judgment or wishes or desires of the interested parties. They have the right, if they so prefer, to receive and hold their interests in common and undivided. Indeed, they have a perfect right to have the estate so distributed to them and then, after the making of the decree of distribution, themselves partition the estate and divide the property thereof among themselves. There is no conceivable reason why they should not pursue such a course if they feel that they can themselves satisfactorily adjust and divide the estate among themselves.

The law in question simply means that, where the decree of distribution awards to the heirs, devisees, and legatees an estate in common and undivided, they are privileged to have their respective interests ascertained, separated, and distributed to them in severalty by a proceeding in partition, if they prefer to have their interests so distributed; but, in



order to accomplish this judicially, and to give the court jurisdiction to order a partition, some interested person must, before the decree of distribution is made, file a petition for that purpose and give legal notice thereof. (Code Civ. Proc., sec. 1676; *Buckley v. Superior Court*, 102 Cal. 6, [41 Am. St. Rep. 135, 36 Pac. 360].) If the petition and the notice required by said section are not filed and given, then, the decree having been made, the court loses further jurisdiction of the whole proceeding and cannot, in the exercise of its probate jurisdiction, order a partition. As before suggested, failure to file a petition for partition in such a case cannot, obviously, have the effect of destroying or in anywise impairing their legal and natural right to dispose of the property so acquired in any manner they may choose.

The further claim is made that the complaint does not show that the plaintiffs "ever obtained any legal possession of the note," or that the note in suit was "delivered to the plaintiffs by the executor or the court"; or that "the said estate was closed, or that the executor was discharged." These objections, like the first above considered, are plainly and clearly without force.

The complaint, as has been shown, explicitly declares that by the court's *final* decree of distribution of the estate of the deceased, the estate was distributed to the beneficiaries under the will of said deceased, and that among the effects thereof so distributed was the note in question; that subsequent to said decree the distributees divided the property of the estate among themselves, and that by the division so made the said note became the property of the plaintiffs jointly "and they are now the owners and holders thereof." Thus it is very clearly made to appear that the estate was distributed, that the beneficiaries divided the same among themselves, which necessarily implies that they received the property so distributed and that the estate was closed, that the note became the joint property of the plaintiffs by the division effected by the beneficiaries themselves, and that they were the owners and holders of the same at the time of the institution of this action.

As stated above, there is absolutely no merit whatever in this appeal, and it would be an unjust imputation against counsel for the appellant to hold that he did not realize the utter futility of the appeal when taking it. We may, there-

fore, properly assume that the appeal was designed to accomplish no other purpose than to delay the execution or satisfaction of the judgment.

Accordingly, the judgment is affirmed, with damages awarded against the appellant in the sum of fifty dollars.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

---

[Civ. No. 1816. First Appellate District.—May 15, 1916.]

**ERNEST CLAXTON, Respondent, v. THE AMERICAN CASUALTY COMPANY (a Corporation), Appellant.**

**ACCIDENT INSURANCE LAW.—CONSTRUCTION OF POLICY.**—The clause in a policy of insurance providing indemnity for loss of life, limb, sight, or time by accidental means, and loss of time by sickness to the extent therein provided, which provides that "if such bodily injury alone shall, directly and independently of all other causes, immediately, continuously, and totally disable and prevent the insured from performing any and every kind of duty pertaining to his business or occupation, and if during the period of such continuous and total disability shall result in any one of the losses specified in Part I hereof, the company will pay the sum specified for such loss, and in addition will pay the weekly indemnity as provided in Part II from the date of the accident to the date of such loss," does not limit the liability of the company to cases where the accident was so severe as to "immediately and continuously" disable and prevent the insured from performing the duties pertaining to his business or occupation, but such clause is intended to provide for two modes of indemnity to injured policy-holders: one, the payment of a stipulated sum for the loss of a member; the other an indemnity in the form of weekly benefits to be paid the injured person during the period of his inability to attend to his business or occupation resulting from the injury, and extending from the date of such injury to the date of the loss of the injured member.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

W. C. Sharpstein, for Appellant.

McClanahan & Derby, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in plaintiff's favor in an action for the recovery of an amount alleged to be due upon an accident insurance policy for the loss of an eye. The only question presented is as to whether the complaint states a cause of action.

The complaint set forth the policy of insurance in full, and then proceeded to aver that while it was in effect the plaintiff suffered an accidental injury to one of his eyes which for several days thereafter seemed trivial and did not give him much concern, but which gradually developed into a cataract which destroyed the sight of his eye. The policy of insurance as shown by its heading "provides indemnity for loss of life, limb, sight or time by accidental means, and loss of time by sickness to the extent herein provided." In the body of the policy there is a provision that for the loss of both eyes the sum of five thousand dollars, and for the loss of one eye the sum of two thousand five hundred dollars shall be payable. The policy also contains the following clause: "Part I.—If such bodily injury alone shall, directly and independently of all other causes, immediately, continuously and totally disable and prevent the insured from performing any and every kind of duty pertaining to his business or occupation, and if during the period of such continuous and total disability shall result in any one of the losses specified in Part I hereof, the company will pay the sum specified for such loss, and *in addition will pay* the weekly indemnity as provided in Part II from the date of the accident to the date of such loss."

There are other clauses in the policy providing that for total disability the sum of \$25 per week shall be payable during the period of such continuous total disability not resulting in total loss, and that for partial disability a gradual payment shall be made depending upon the extent of the disability for a period not exceeding 52 consecutive weeks.

It is the contention of the appellant that the provision of the policy above quoted *in haec verba* limits the liability of the defendant to cases where the accident "immediately and continuously" disables and prevents the insured from per-

forming the duties pertaining to his business or occupation; and that since in this case the complaint shows affirmatively that the accident and injury did not immediately or continuously cause the total loss of sight in the plaintiff's injured eye, he cannot recover under the provisions of his policy, and hence that his complaint did not state a cause of action.

We cannot give our assent to such a narrow and limited interpretation of this insurance policy. Read as a whole it is evident that it was intended to provide for two modes of indemnity to injured policy-holders: one, the payment of a stipulated sum for the loss of an eye; the other an indemnity in the form of weekly benefits to be paid the injured person during the period of his inability to attend to his business or occupation resulting from the injury and extending from the date of such injury to the date of the loss of the injured member. So construed, the terms of this policy are reasonable and consistent; while on the other hand, to give the quoted clause the meaning which the appellant claims for it would be to limit the operation of the policy to cases where the accident was so severe as to immediately and continuously deprive the insured of the sight of his eye and thus practically immediately create the loss. The use of the words "in addition" in the quoted passage clearly indicates the distinction to be observed between the terms "disability" and "loss" in this policy; and also serves to show that the intended scope of said provision was to define the conditions under which disability benefits would be payable, but not to prescribe the condition under which the lump sum payable for the loss of the plaintiff's eye should be due.

It follows from this broader and more reasonable and consistent construction of the policy that the complaint states a cause of action.

Judgment affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1916.



[Civ. No. 1541. Third Appellate District.—May 15, 1916.]

**F. HOOPER et al., as Copartners, etc., Respondents, v.  
SPARROW SMITH, Appellant.**

**APPEAL—JUDGMENT BY DEFAULT—NOTICE OF ORDER OVERRULING DEMURRER—PRESUMPTION FROM RECORD.**—Upon an appeal taken from a judgment entered for failure to answer after demurrer overruled, it will be presumed that notice of the order overruling the demurrer was given, where such appeal is taken upon the judgment-roll without any statement or bill of exceptions.

**ACTION FOR GOODS SOLD—PLEADING—PRESUMPTION AS TO OWNERSHIP OF DEBT.**—In an action for goods sold the complaint sufficiently shows the ownership of the indebtedness at the time of the filing thereof, where it is alleged that the defendant was indebted to the plaintiff for such goods on a date prior to the filing of such complaint, and it is further alleged that such indebtedness has not been paid to the plaintiff.

**APPEAL** from a judgment of the Superior Court of Solano County. W. T. O'Donnell, Judge.

The facts are stated in the opinion of the court.

White, Miller, Needham & Harber, for Appellant.

Francis C. McInnis, for Respondents.

**ELLISON, J., pro tem.**—The complaint in this action was filed January 20, 1915. The first paragraph thereof alleges that the plaintiff is a copartnership. The second paragraph is: "That on the 1st day of January, 1915, the defendant above named was indebted to plaintiffs above named in the sum of five hundred and fifty dollars and 42/100 (\$550.42) on an open book account for goods, groceries, wares and merchandise sold and delivered by plaintiffs above named to defendant above named, between the 1st day of September, 1911, and the 31st day of August, 1914, at defendant's special instances and requests." The third paragraph is: "That said defendant has not paid the same, nor any part thereof" and the prayer is for judgment for the amount alleged in the complaint as due.

To this complaint a demurrer was interposed by the defendant. March 22, 1915, the court made an order overruling

the demurrer and giving the defendant ten days to answer the complaint. April 5, 1915, no answer having been filed, the default of the defendant was entered and judgment in favor of the plaintiffs and against the defendant for the amount prayed for in the complaint was made and entered. The first paragraph of the judgment so entered reads: "In this action the defendant, Sparrow Smith, having failed to appear and answer plaintiffs' complaint herein, and the legal time for answering having expired, and the default of said defendant in the premises having been duly entered according to law, now at this day on application of Francis C. McInnis, attorney for said plaintiffs, it is ordered," etc. From the judgment as entered the defendant has brought this appeal upon the judgment-roll without any statement or bill of exceptions.

In his opening brief he states that he relies upon two points for a reversal, viz.: 1. "No notice was given of the order overruling the demurrer as required by section 476, Code of Civil Procedure, and the clerk had no authority to enter the judgment," and 2. "That the complaint does not state facts sufficient to constitute a present cause of action."

Appellant's first point cannot be considered on appeal from the judgment in the absence of any bill of exceptions. This is clearly decided in *Catanich v. Hayes*, 52 Cal. 338, wherein it is stated: "The notice of the overruling of the demurrer to the complaint if one was given, would not of itself form a part of the judgment roll; and if a party desires to have it appear from the judgment roll that such notice was or was not given he may incorporate the fact in a bill of exceptions, and the bill will be included in the judgment roll. The judgment before us recites that the time allowed by the court for answering had expired; and the record being silent as to the time allowed therefor, as well as to the giving of notice of the overruling of the demurrer, it will be presumed, in support of the judgment, that the court, before ordering entry of the judgment, had satisfactory evidence that the time for answering had expired." As counsel for appellant in his reply brief makes the following concession—"Respondent cites authorities showing that the notice of the order overruling the demurrer is not a part of the judgment roll. This being so, the first point made by us is not well taken on this appeal"—the point need not be further discussed.

Appellant's second point, that the complaint does not state a present cause of action in favor of the plaintiffs and against the defendant, is based upon this consideration: That the complaint was filed on the twentieth day of January, 1915, and alleges that, on the first day of January, 1915, the defendant *was* indebted to the plaintiffs. Counsel's claim is that these allegations are not sufficient in a pleading to show that on *January 20th* the defendant *was* indebted to the plaintiff.

The complaint contains the further allegation: "That the defendant has not paid the same, nor any part thereof."

It is clear from the language of the complaint that, on January 1, 1915, the defendant *was* indebted and that the plaintiffs were the owners of that indebtedness. It is equally clear that, on January 20th, the defendants were still indebted to the amount stated in the complaint, but it is appellant's claim that it is not clear that, on January 20th, the indebtedness was owned by the plaintiffs. It is suggested that in the interim they may have sold it to someone else and that the pleading should have negatived this possibility.

*Pryce v. Jordan*, 69 Cal. 569, [11 Pac. 185], was an action upon a promissory note. The complaint alleged the making of the note December 15, 1878, the indorsement of the same to plaintiff July 16, 1881, and the suit was brought March 6, 1882. A demurrer to the complaint was filed, and it was contended that the complaint was insufficient because it did not show that plaintiff since the indorsement and delivery of the note to him had continued to be the owner and holder of it, or that he was such at the commencement of the action. This is exactly the position now taken here by the appellant. Deciding the point the court said: "But it shows that the plaintiff acquired title to the note from the original payee by the indorsement, assignment and delivery. As matter of law, therefore, the title to the note passed to the plaintiff and the legal presumption is also that he continued to be and was, at the commencement of the action, the owner and holder of the note, and as such the real party in interest and entitled to sue. These legal conclusions, deducible from the facts averred in the complaint, constitute no part of the allegation of facts necessary to constitute a cause of action."

The complaint alleging the ownership of the indebtedness on January 1st by the plaintiffs, the legal presumption is that

they were such owners on January 20th, and this legal conclusion need not be alleged. There are decisions holding that in actions to recover specific property it is necessary to allege that plaintiff was the owner at the time of bringing action, and counsel for appellant has referred to some of them in his brief. "Such an allegation or its equivalent," says the supreme court, in *Curtin v. Kowalsky*, 145 Cal. 431, [78 Pac. 962], in construing an action to recover upon a money judgment, "is required in actions to recover specific property, but not in actions to recover on money demands." (*Rock Ridge Park Co. v. Wells*, 27 Cal. App. 281, [149 Pac. 792].)

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

---

[Crim. No. 471. Second Appellate District.—May 15, 1916.]

THE PEOPLE, Respondent, v. A. L. CHAMPION,  
Appellant.

**CRIMINAL LAW—FAILURE TO PROVIDE FOR MINOR CHILD—LIABILITY OF FATHER AFTER DIVORCE—SECTION 270, PENAL CODE.**—The court in an action for divorce has the power to compel a father to support his children even though he is deprived of their custody, and where he willfully fails to do so, he is liable to prosecution under section 270 of the Penal Code, and the fact that he is imprisoned for failure to do so does not constitute imprisonment for debt in a civil action, within the meaning of the constitution, although the order for support was made by his consent, as the order derives its force from the power of the court and not from contract.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

William Freeman, and John D. Dawson, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.



CONREY, P. J.—Appeal by the defendant from the judgment, and from an order denying his motion for a new trial.

Defendant was convicted of the offense described in section 270 of the Penal Code, and sentenced to imprisonment in the county jail of Los Angeles County for a term of three months. The charge was that the defendant, during a certain period of five months in the year 1915, willfully omitted to furnish necessary food, clothing, shelter and medical attendance to his minor children named in the information. There are no briefs on file, and we shall confine our attention to the propositions urged on behalf of appellant at the oral argument.

In January, 1915, in an action of divorce in the superior court of Los Angeles County wherein this defendant was defendant, and the mother of said minor children was plaintiff, the court denied the plaintiff's petition for a divorce, and decreed that the defendant as cross-complainant was entitled to a divorce from the plaintiff. The court having further found that both parties were fit to have custody of the children, awarded the custody of them to the mother, and after making certain provisions concerning the property interests of the parties, ordered that the defendant pay \$6 a week for the support of said minor children. Counsel for appellant, after directing our attention to these facts, contended that under the evidence in this case it appears that the order for payment of money by him was made by his consent upon a stipulation, and that to imprison him for failure to make payments in accordance with that decree is to imprison him for debt, which he contends would be a violation of defendant's constitutional rights.

The record clearly establishes that the decree and order in question derived their force entirely from the power of the court, and not from any contract or consent on the part of defendant. In an action for divorce the court has authority to make such order for the custody, care, education, maintenance, and support of the minor children as may seem necessary or proper. (Civ. Code, sec. 138.) The fact that during the period of time covered by the information in this case the children were not in the custody of their father, made it necessary for the prosecution to show that his obligation to contribute toward the support of the children was not suspended, as he might have contended that it was under

section 196 of the Civil Code, which declares that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances. . . ." For it has been held that where in a divorce proceeding the custody of a minor child is given to the mother, and no provision in the decree is made for the support of such child by the father, the parent entitled to the custody of the child must support it. (*People v. Hartman*, 23 Cal. App. 72, 79, [137 Pac. 611]; *Matter of McMullin*, 164 Cal. 504, [129 Pac. 773].) It has been held further, in a case arising under section 139 of the Civil Code, that that section empowers the courts in cases of divorce to compel a parent to support his children after being deprived of their custody. (*People v. Schlott*, 162 Cal. 347, [122 Pac. 846].) Section 139 declares the power of the court where a divorce is granted for an offense of the husband, to compel him to provide for the maintenance of the children of the marriage. But it appears that under section 138 like power exists in all divorce cases and at all stages of the proceedings.

We are satisfied that there is no ground for the contention that punishment of the defendant under section 270 of the Penal Code would conflict with his constitutional right to be exempt from imprisonment "for debt in any civil action" (Const., art. I, sec. 15); for that would not even indirectly be the effect of the judgment. The record of the divorce case merely establishes the fact that the defendant's legal obligation as father of the children to contribute to their support has not been suspended or removed by the order removing them from his custody. Under these circumstances he is liable to punishment upon a showing that he has willfully omitted without lawful excuse to furnish necessary food, etc., for their use.

It is further contended that the evidence fails to show a willful omission by the defendant to make the necessary provision for the support of his children, and fails to show that they were not in fact sufficiently supported by their mother. Since there was evidence tending to support the accusation as to these matters, we find no sufficient reason for setting aside the verdict of the jury.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1534. Third Appellate District.—May 15, 1916.]

**GUNNARD PETERSON, Petitioner, v. SUPERIOR COURT  
OF THE COUNTY OF BUTTE et al., Respondents.**

**JUSTICE'S COURT—APPLICATION TO SET ASIDE JUDGMENT BY DEFAULT—**  
**TIME.**—The time to file an application under section 859 of the Code of Civil Procedure to be relieved from a judgment entered by default in a justice's court, on the ground that such judgment had been taken by mistake, inadvertence, surprise and excusable neglect, begins to run from service of written notice of entry of the judgment as required by section 898 of the Code of Civil Procedure, as amended in 1915.

**ID.—PREPARATION OF AFFIDAVITS—NOTICE OF ENTRY OF JUDGMENT NOT**  
**WAIVED.**—Service of written notice of the entry of such a judgment is not waived by the mere preparation of affidavits to be used upon the application to be relieved therefrom.

**APPLICATION** for a Writ of Certiorari originally made to the District Court of Appeal for the Third Appellate District to annul an order of the Superior Court vacating a default judgment of a justice's court.

The facts are stated in the opinion of the court.

King & King, for Petitioner.

J. Oscar Goldstein, for Respondents.

**HART, J.—*Certiorari.*** The petition shows: That on the eighth day of December, 1915, the petitioner instituted an action in the justice's court of Nelson Township, Butte County, against W. B. Linn and William Utter, copartners engaged in business under the firm name and style of Linn & Utter, for the recovery of the sum of \$230, alleged to be a balance remaining due on two promissory notes, together with costs of suit, including attorney's fees, as provided in said notes. On the same day, upon an affidavit filed for that purpose, a writ of attachment was issued and the same levied upon property belonging to the defendant, Utter.

On the fourteenth day of December, 1915, the defendants were each served with summons, together with a copy of the complaint, at Chico, in Butte County, and the constable serv-

ing the same made due return of such service on the sixteenth day of December, 1915.

On the sixteenth day of December, 1915, an undertaking for the release of the attachment was filed in the sum of \$647.02.

On January 3d, the defendants having failed to answer or demur to the complaint within legal time, a default judgment was entered against them for the amount sued for and costs.

On January 15, 1916, J. Oscar Goldstein, attorney for the defendants, filed and served notice of a motion to set aside the judgment so entered on the ground that the same had been taken against the defendants through their "mistake, inadvertence, surprise and excusable neglect." (Code Civ. Proc., sec. 859.) Said notice fixed the time for the hearing of said motion for the twenty-fifth day of January, 1916, or ten days from the date of the filing and service of the notice. On the day last mentioned the motion was heard, and the justice denied the same, and so refused to set aside and vacate the default judgment entered against the defendants. Thereafter (February 2, 1916), the defendants took an appeal to the superior court from the order of said justice refusing to open up the default, the appeal being on questions of law only.

On the twenty-first day of February, 1916, the appeal was heard and, on the twenty-fourth day of that month, the superior court made the following order in the cause: "The clerk of this court is directed to enter an order sustaining the motion of the defendants to return this cause to the justice's court of Nelson Township, with directions to the justice of said court to set aside the default judgment and permit the defendants to file their answers and proper pleas to plaintiff's action against them. The defendants are entitled to recover their costs in this court on this appeal."

It is the foregoing order which the petitioner by this proceeding asks to have annulled and vacated on the ground that the superior court was without jurisdiction to make it. The contention is that the application by the defendants to be relieved from the judgment entered against them by default by the justice of the peace was not made within the time prescribed by section 859 of the Code of Civil Procedure. That section reads, in part: "... The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake,

inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor."

The supreme court has held that where an application for relief under section 859 of the Code of Civil Procedure is made, it must not only be filed, but must be called up for action thereon by the court and the court moved to grant it within ten days after notice of the decision has been served on the losing party. (*Spencer v. Branham*, 109 Cal. 336, [41 Pac. 1095]; *People v. Ah Sam*, 41 Cal. 645.)

The application to the justice of the peace to set aside and vacate the default judgment was supported and resisted by affidavits filed by the respective parties, which, presumptively, were among the papers and documents used on the appeal to the superior court. (Code Civ. Proc., sec. 975.) The salient facts leading to this controversy, and upon which the determination of the question submitted here depends, are not disputed. It is, indeed, conceded that the defendants were not served with the written notice of the entry of the judgment against them by default required by section 893 of the Code of Civil Procedure, as amended by the legislature of 1915. (Stats. 1915, p. 1441.) It is claimed, however, that the fact of the preparation of the affidavits by which the defendants supported their application to be relieved from the default judgment constituted an unequivocal act of waiver of notice of the entry of said judgment, and that, therefore, the time within which the defendants were required to apply and move for an order setting aside the default began to run from the dates of said affidavits. These affidavits were made on the thirteenth and fourteenth days of January, 1916, or 11 and 12 days, respectively, prior to the date fixed in the notice of motion to vacate the default for the hearing of said motion, viz., the twenty-fifth day of January, 1916, and, obviously, if the time of the mere formulation or preparation of the affidavits constituted an act involving a waiver of notice of the entry of the judgment, then the time for application for relief under section 859 would, at the time of the preparation and execution of the affidavits, begin to run, and the defendants would, therefore, be without a remedy and the respondents without jurisdiction to make the order complained of. If, on the other hand, waiver did not take place until the filing of

the application in the justice's court, as is the theory of the respondents, then the defendants were within time and the jurisdiction of the respondents to make the order assailed here is unimpeachable.

It is a settled rule that where the statute requires notice to be given a party of any action of a court in any proceeding the notice so given must be precisely the one prescribed by the statute. Prior to the amendment of section 893 of the Code of Civil Procedure by the legislature of 1915, it was held that where, under various provisions of our code, notice of a decision is required to be given, written notice is usually intended. (*Forni v Yoell*, 99 Cal. 173, 176, [33 Pac. 887], citing sec. 1010, Code Civ. Proc.) Under the amendment of section 893, however, it is now imperatively required. But "any one may waive the advantage of a law intended solely for his benefit . . ." (Civ. Code, sec. 3513), and, accordingly, notice of a decision of a court may be waived. But, as is said, in *Forni v. Yoell*, 99 Cal. 173, 176, [33 Pac. 887], "the evidence of a waiver which deprives a party of a positive right granted him by law should be of such a positive and conclusive character as to leave no rational doubt." Likewise, in *Gardner v. Stare*, 135 Cal. 118, [67 Pac. 5], the court expresses itself. It is there said: "The evidence of such waiver must be clear and uncontradicted—not dependent upon oral testimony or *ex parte* affidavits." It is further said therein: "A written admission by a party entitled to notice, of knowledge that the decision had been made, filed with the clerk or entered upon the minutes of the court, would supersede the necessity of giving such notice; and a motion to the court or other proceeding by a party, with reference to the decision, which presumes his knowledge that it has been made, and by which he seeks to protect his own interest against the rights of the other party under the decision, will be regarded as a waiver of his right to a notice of the decision." Again in *Mallory v. See*, 129 Cal. 356, [61 Pac. 1123], it is said: "The rule would, therefore, seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court."

In this case, J. Oscar Goldstein, attorney for the defendants, in his affidavit filed in the justice's court in support of the motion to vacate the judgment, declared that the first intimation he received of the entry of the judgment on the default

of the defendants was on the tenth day of January, 1916. On that day, he likewise declared, he met in Oroville one of the attorneys of the petitioner and by her was informed that the judgment had been entered on the third day of January, 1916; that, upon his return to his home at Chico, he conveyed to the defendants the information so obtained by him.

As before stated, the defendants had not been regularly served with notice of the decision or the entry of the judgment, and in their affidavits each deposed that he was much surprised upon being told by their attorney that a default judgment had been entered against them.

It is perfectly clear that the information obtained by Goldstein and the defendants of the entry of the judgment cannot be held to have amounted to the transmission to them of actual knowledge of the entry of said judgment. The information was the result of a mere hearsay statement, and, while it was doubtless sufficient to put the parties on their guard, or to start them on an investigation which would lead to actual knowledge of the fact of the entry of the judgment, it did not, as stated, constitute actual knowledge. Nor did the mere preparation and verification of the affidavits by which the defendants intended to support their motion to vacate the judgment upon such information involve a waiver of notice of the entry of the judgment. The mere preparation and verification of the affidavits did not constitute "a written admission" of knowledge, nor a "motion to the court or other proceeding with reference to the decision, which presumed knowledge that the decision had been made." The only motion or proceeding from which knowledge by the defendants of the entry of judgment may be presumed was the motion or application to be relieved from the default. And it was only when that application was filed that the waiver occurred, and consequently the time within which the defendants were required to make their motion, and ask the action of the court thereon, began to run from the date of the filing of said application. It results, of course, that the defendants were within legal time in the presentation of their application for relief under the terms of section 859 of the Code of Civil Procedure, and that the superior court, in making the order attacked by this proceeding, acted within the sphere of its lawful jurisdiction.

The demurrer, which was interposed by the respondents to the petition, is, accordingly, sustained, and the order to show cause discharged.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

---

[Crim. No. 474. Second Appellate District.—May 15, 1916.]

THE PEOPLE, Respondent, v. W. O. TRUAX, Appellant.

**CRIMINAL LAW—EVIDENCE—WITNESS AS ACCOMPLICE—WHEN QUESTION FOR JURY.**—In a criminal action it is for the jury to determine from the evidence whether, as a matter of fact, a witness is an accomplice, if the facts are disputed; and it is only where, the acts and conduct of a witness being admitted, they necessarily establish the witness' participation in the guilty act, or guilty relation thereto, that the court should determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice.

**Id.—BURNING OF INSURED PROPERTY—WITNESS AS ACCOMPLICE—QUESTION FOR JURY.**—In this prosecution for burning and destroying insured property with intent to defraud the insurer, in violation of section 548 of the Penal Code, it is held that the testimony of a certain witness did not constitute such an admission of guilty participation in the alleged crime as would warrant the court in declaring him to be an accomplice without leaving the fact to be determined by the jury.

**APPEAL** from a judgment of the Superior Court of Imperial County, and from an order denying a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

W. F. Frazier, C. Ibeson Sweet, and O. V. Willson, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**CONREY, P. J.**—Appellant was convicted of willfully burning and destroying insured property with intent to de-

fraud the insurer in violation of section 548 of the Penal Code. He appeals from the judgment and from an order denying his motion for a new trial.

It seems to be conceded that the only evidence which tends to connect the defendant with the commission of the crime is contained in the testimony of three witnesses, who by their own admission were accomplices of the defendant, and in the testimony of one Arthur Barnaman. The court refused to instruct the jury that Barnaman was an accomplice, but gave appropriate instructions upon the rules requiring corroboration of the testimony of accomplices.

It is for the jury to determine from the evidence whether as a matter of fact the witness is an accomplice, if the facts are disputed. It is only where, the acts and conduct of a witness being admitted, they necessarily establish the witness' participation in the guilty act, or guilty relation thereto, that the court should determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice. (*People v. Coffey*, 161 Cal. 433, 436, [39 L. R. A. (N. S.) 704, 119 Pac. 901].) According to his own testimony, the witness Barnaman had heard statements and observed conduct of the defendant which must have warned him that an incendiary fire was contemplated. He said that he knew there was to be a fire at the Bassett house and that after receiving such information, he, at the request of Burright (one of the admitted accomplices), carried a bed to that house, and he supposed that the bed was to be used in connection with the fire. But Barnaman modified this testimony by stating that he had not visited the Bassett house within two weeks preceding the fire; that it was later on, after carrying the furniture there, that he found a fire was to occur and that he was "only suspicious that that was the particular house" that was to be burned.

However reprehensible the conduct of this witness may have been, we cannot say that this testimony constitutes such an admission of guilty participation in the alleged crime as would warrant the court in declaring him to be an accomplice without leaving the fact to be determined by the jury.

Appellant also contends that the information is void for uncertainty because it does not state facts constituting the intended fraud upon the insurance company, nor the particular circumstances connecting appellant with that element of the offense; and that therefore the demurrer should have been

sustained. But we think that the demurrer was properly overruled. In *People v. Barbera*, 29 Cal. App. 604, [157 Pac. 532], decided February 9, 1916, we had under consideration an indictment charging a like offense, in which the facts were stated in similar form to this information. For reasons there stated, it was held that the indictment was sufficiently direct, certain and complete as to the circumstances of the offense.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1916.

---

[Crim. No. 477. Second Appellate District.—May 17, 1916.]

THE PEOPLE, Respondent, v. E. L. WILKISON,  
Appellant.

**CRIMINAL LAW—SETTING FIRE TO PILE OF BALED HAY—EVIDENCE—VOLUNTARY CHARACTER OF CONFESSION.**—In a prosecution for the crime of having set fire to a pile of baled hay, an admission of guilt made by the defendant to the officer who arrested him, is not involuntary, because of the declaration made by the officer to him to tell the truth, after the defendant had so declared his intention.

**ID.—SUFFICIENCY OF PROOF OF CORPUS DELICTI.**—In such a prosecution the *corpus delicti* is sufficiently proven by the testimony of the officer who found the hay burning in his description of the conditions as he discovered them and of the character of the hay, together with its situation in an open lot, showing the fire was of incendiary origin.

**ID.—PLEAS OF ONCE IN JEOPARDY AND FORMER ACQUITTAL—INSTRUCTION—DIRECTION TO FIND FOR PEOPLE UPON PLEA OF ONCE IN JEOPARDY—FAILURE TO FIND ON PLEA OF FORMER ACQUITTAL—EVIDENCE—LACK OF PREJUDICE.**—Where in such a prosecution the defendant in addition to his plea of not guilty interposed a plea of once in jeopardy, and of former acquittal, based upon the ground of variance between the charge and the proof in the first prosecution, there is no error in directing the jury that it should find for the people on the plea of once in jeopardy, nor is the defendant prejudiced by the omission of the jury to find on the plea of former

acquittal, as the finding upon the former plea under the testimony relied upon in support of both pleas, necessarily included an adverse finding upon the plea of previous acquittal.

**ID.—EVIDENCE—SETTING OF SUBSEQUENT FIRES—ERROR NOT PREJUDICIAL.**—It is error to admit proof of the setting of a number of fires by the defendant after the fire in question, and upon the same night, but it is not sufficiently erroneous, where it appears from the whole evidence that the conviction of the defendant was justified.

**ID.—INSTRUCTION—MALICE.**—In such a prosecution there is no error in giving to the jury the definition of malice as the same is found in subdivision 4 of section 7 of the Penal Code.

**APPEAL** from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial. J. W. Curtis, Judge.

The facts are stated in the opinion of the court.

Robt. M. McHargue, and Frank T. Bates, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**JAMES, J.**—Defendant was charged with having set fire to a pile of baled hay which was owned by a corporation. His conviction followed, after which a motion for a new trial was made. The appeal is taken from a judgment of imprisonment, and also from the order denying the motion for a new trial.

The section under which defendant was prosecuted provides in part as follows (Pen. Code, sec. 600): "Every person who willfully and maliciously burns any . . . stack of hay or grain or straw of any kind, or any pile of baled hay or straw, . . . not the property of such person, is punishable, . . ." etc. One Warrick, who it is claimed participated with the defendant in the commission of the offense, testified at the trial. He testified that on the day preceding the night when the burning occurred, he and the defendant had been drinking liquor, and that by the time evening came both of them were considerably intoxicated; that this defendant proposed that they burn the pile of hay, which belonged to the Chino Land and Water Company, saying that he, the defendant, had a grudge against that company because they had "beaten him out of some money" at a time previous; that

the two went to the hay-pile; that each of them lighted a match and set fire to the hay; that on their return they stopped at the house of one Andrews, and there statements were made as to what they had been doing, and that the defendant repeated to Andrews his statement that he had a grudge against the corporation mentioned; that they then proceeded to other places, barns, etc., and set some four or five more fires that night. Andrews testified in corroboration of the statement made by Warrick as to the conversation had at his house, and as to the statement made by the defendant that they had set fire to the hay because defendant had a grudge against the Chino corporation. Another witness, an officer, testified to the fact that he found the hay burning and that there was no other fire about the stack, which he said was located some two hundred yards away from the railroad track; that the stack was in an open field. This witness also testified that he knew the hay to be that of the Chino Land and Water Company because he had known of its being hauled there for that company, and that he had just had negotiations with the company's manager for the purchase of some of the hay. The peace officer testified that at the time he arrested this defendant he found him at his mother's place in Chino, and that the defendant made certain statements to him without any promise of reward, or any threat being made, or any inducement of any kind being held out to him. This officer testified that the defendant said "he and Warrick started the fire." The question was then asked the witness: "What fires were you talking of to him when he made the statement? A. The Chino Land & Water Company's hay pile and Mr. Newman's barn and Mr. Snyder's place and Mr. Bickmore's place and Mr. Eckhart's place." This officer on cross-examination said that he asked the defendant what he knew about the fires in Chino, and that the defendant replied, "I don't know anything about them." The witness then said: "That was his first statement, and I looked at him and I saw his hands and limbs all atremble; his hands and limbs were all shaky; and he said, 'I will come out and tell you the truth about it,' and I said, 'It is always best to tell the truth,' and then he told me him and Warrick set the fires." It is insisted that the testimony of the alleged confession of the defendant was improperly admitted over the objection on the ground that the

same was not voluntary. The officer stated that he made no promises nor threats to induce the statement, and his testimony, both direct and on cross-examination, discloses no improper influence having been brought to bear to produce the incriminating admission. The mere statement of the officer, after the defendant's declaration that he would come out and tell the truth, that it was always best to tell the truth, cannot be classed as having an improper influence for the reason that the defendant, according to the officer's testimony, had already made up his mind to declare the truth.

It is further claimed that there was no sufficient proof of the *corpus delicti*, except as it was furnished by the words of the accomplice, Warrick. The *corpus delicti* may always be shown by proof of circumstances. The officer who found the hay burning, and described to the jury the conditions as he discovered them, and gave a description of the character of the pile of hay, together with its situation in an open lot, furnished ample evidence from which the jury could properly conclude that the fire was of incendiary origin. The testimony of this accomplice, together with the express admission of the defendant, furnished abundant proof upon which to base a verdict of guilty. The defendant testified as a witness on his own behalf, and while he denied active participation in the setting of the fire, admitted that he went to the pile of hay with Warrick. He admitted further being present at Andrews' house, but sought to shift the responsibility for the remark as to the grudge against the Chino company from himself to Warrick. A case was so plainly made out against the defendant upon the whole testimony, as we view it, that it would be almost inconceivable that the jury could have decided otherwise upon the proof presented. That consideration will be borne in mind when certain other objections urged by the appellant are considered.

It appears that two trials were had of this defendant: The information in the first case charged that he burned a "stack of hay." At the conclusion of the testimony, it having been shown that the hay burned was a pile of baled hay, the court directed the jury to find a verdict for the defendant on the ground of variance between the charge and the proof. The defendant had asked that the case be dismissed on the same ground. The second information was then filed, upon which this trial was had, wherein the defendant was charged

with having burned "a pile of baled hay." To this second charge, in addition to his plea of not guilty, defendant interposed a plea of once in jeopardy and of former acquittal, basing both pleas upon evidence of the acquittal made because of the variance mentioned. The jury in the case was advised by the court that it should find for the people on the plea of once in jeopardy, but no verdict was returned on the plea of former acquittal. Appellant insists here that, not only was the court in error in directing the jury to find for the people on the plea of former jeopardy, but that he was entitled to a verdict on the plea of former acquittal, and that no jurisdiction resided in the court to pronounce judgment until such a verdict had been rendered. It should be remembered that the evidence offered in support of the plea of once in jeopardy and that of former acquittal was the same, to wit, the record of the proceedings had in the first trial. While it is true in general that a plea of once in jeopardy presents a question of fact which the jury has the right to solve, where the evidence is uncontradicted and shows a state of the case such as that disclosed here, the question becomes more particularly one of law upon which the court is authorized to advise the jury directly. (*People v. Cummings*, 123 Cal. 269, [55 Pac. 898]; *People v. Ammerman*, 118 Cal. 23, [56 Pac. 15].) And we think that where the jury made its finding upon a plea of not guilty and once in jeopardy, the judgment is not rendered invalid because of the failure to find particularly upon the plea of former acquittal. As has been mentioned, precisely the same facts were relied upon to support the latter plea as were relied upon to sustain the plea of jeopardy. If the defendant had been formerly acquitted, he would also have been in jeopardy. The finding of the jury under the facts here disclosed, upon the plea of once in jeopardy, necessarily included an adverse finding upon the plea of previous acquittal.

The defendant has complained that the court had no right in the first trial to give a mandatory instruction directing his acquittal, but the sole argument in support of this objection seems to be that the court should have advised but not "directed" such a verdict. We think that the defendant is not in a position to raise this objection, as the action of the court was favorable to him, rather than the contrary. The fact that he was at that time insisting upon his motion

to dismiss the case, does not, we think, add any force to the position which he now takes regarding that matter. Cases have been reversed where the appeal was taken by the people from an instruction directing a verdict, but we have yet to find one where the defendant has claimed to have suffered prejudice for like cause. The court under the state of the case at the first trial was altogether justified in refusing to dismiss the charge, and would have been justified in refusing to "advise" the jury to acquit, without it appearing that such acquittal was by reason of the variance between the proof and the charge, which acquittal, under section 1021 of the Penal Code, constitutes no bar to a further prosecution.

The court in instructing the jury stated the definition of the word "malice" as the same is found in subdivision 4 of section 7 of the Penal Code, as follows: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." The court gave a further instruction to the jury in which the jury was advised that it was necessary for the prosecution to prove malice, as it was one of the material elements of the offense, and stated: "And in this connection, you are instructed that malice is not presumed, and you cannot presume that any act of the defendant was malicious, but the malice on the part of the defendant must be established by the prosecution as one of the material elements of the offense, and you must be satisfied that the acts of the defendant were malicious to the same extent that you must be satisfied with any other material element of this offense." The appellant insists that the malice mentioned in section 600 of the Penal Code is a particular malice which becomes as of the intent with which the crime is committed, and is not such malice as is defined by subdivision 4 of section 7 above quoted. The code definition of malice is applicable in all cases where the word "malicious" is used in the code as the part of the definition of an offense. It is only in cases where in the description of the offense some qualification is made as to the meaning of that term or as to the proof thereof, that a defendant has a right to further instruction upon that subject. We find in the case of *People v. Dice*, 120 Cal. 189, [52 Pac. 477], where the charge was murder, that the supreme court sustained the giving of an instruction which declared the definition of malice

in the terms first stated above. In that case the further instruction was given as to express and implied malice agreeable to the special provisions of the section which immediately follows that defining the crime of murder. (See, also, *People v. Taylor*, 36 Cal. 255; *People v. Myring*, 144 Cal. 351, [77 Pac. 975]; *People v. Ah Toon*, 68 Cal. 362, [9 Pac. 311]; *Davis v. Pacific Telephone etc. Co.*, 127 Cal. 312, [59 Pac. 698].)

It is further claimed that the court erred in allowing proof to be made of the fact that a number of fires were set by Warwick and the defendant after the pile of baled hay was kindled and on the same night. Conceding that proof of after-committed offenses is not admissible in support of a criminal charge, we feel wholly justified in this case in resolving the error against the defendant for the reason that upon the whole case we think that the conviction was just, and that there has been no miscarriage of justice. The chief points relied upon by the appellant have now been considered. The instructions of the court were quite complete and seem to have fully stated the law applicable to the case.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1406. Second Appellate District.—May 17, 1916.]

C. HARPOLD, Respondent, v. THOS. A. SLOCUM et al.,  
Appellants.

**ACTION ON PROMISSORY NOTE—CONSIDERATION—ERRONEOUS EXCLUSION OF EVIDENCE.**—In an action on a promissory note, where the defendants in their answer do not deny its execution or the fact of nonpayment, but allege that it was given as security for the faithful performance on their part of a certain agreement, it is error for the court to exclude evidence offered by the defendants to support this plea, where it appears that the note was executed almost one year after the making of the contract, the contract containing no condition for the giving of security, but being complete in its recital of the things agreed upon by the parties, and when the note was given the time not having arrived when the defendants were called upon to account.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

B. P. Welch, and J. R. Jaffray, for Appellants.

Cedric E. Johnson, Andrews, Toland & Andrews, and Thos. O. Toland, for Respondent.

**JAMES, J.**—Appeal from a judgment in favor of the plaintiff, and from an order denying to the defendants a new trial.

Plaintiff brought this action to recover on a promissory note for the principal sum of \$1,750, dated November 28, 1910, and maturing one year after date. Defendants answering did not deny the execution of the note nor the fact as alleged that nothing had been paid thereon, but affirmatively alleged that "said note, at the time of its execution and delivery, was and ever since has been, a security given by these defendants to the plaintiff for the faithful performance on their part of a certain agreement before that time entered into between said parties, which agreement is in words and figures as follows:

"This agreement, made and entered into this 2nd day of December, 1909, by and between C. Harpold of Santa Paula, State of California, and Thos. A. Slocum and J. H. Slocum of Los Angeles, State aforesaid, each with the other witnesseth;

"That all three of the parties are the owners of a certain house and lot, on Twenty-fifth street near San Pedro, for which they have traded the garage in Santa Paula, on which building C. Harpold owned a mortgage for one thousand dollars (1000), therefore, be it understood and agreed between all parties hereto, that as consideration for surrendering the mortgage, aforesaid, the said C. Harpold shall receive as an interest in such property, or out of any money received for the sale of the aforesaid house and lot, or any trade that is made on or with said property as a basis, the first thousand (1000) dollars after which all the remainder shall be divided among the several parties hereto in equal parts.

"It is understood and agreed among the three parties to this agreement that for convenience in handling the deed shall be

made out in the name of Thos. A. Slocum, though the ownership shall be held in all three in the ratio aforesaid and that the said Thos. A. Slocum shall act as Trustee.

"In witness whereof we hereby set our hands and seal the year and day above written,

"C. HARPOLD.

"THOS. A. SLOCUM,

"J. H. SLOCUM."

This allegation followed: "Defendants further state that there was no other consideration for the giving of said note than that it should be such security; that no consideration has passed to either of them or from said plaintiff for said note, and that plaintiff has not given up or assigned to defendants or to any one for them his rights under said agreement of trust. . . ." The genuineness and due execution of the contract set out in the answer, and above quoted, was admitted. (Code Civ. Proc., sec. 448.) Upon trial being had, objections to evidence offered on the part of the defendants to show the consideration for the note and that such consideration was only as they had alleged in their answer, were sustained. The trial court took the view that to allow such evidence would be to permit the varying of the terms of a written instrument. It will be observed that the note was executed almost one year after the making of the contract which is set out in the answer. This contract contained no condition for the giving of security to the plaintiff. It was complete in its recital of the things agreed upon by the parties. When the note was given the time had not arrived when the defendants were called upon to account—in other words, the contract had not matured. Under such a condition of fact the giving of the note would appear to have been a gratuitous act, rendered without legal consideration moving to the makers of the note. This, of course, assuming the allegations of the answer to be true. The question is, not whether the defendants might be able to maintain by sufficient evidence the claim set up by way of defense, but whether they should have been allowed to offer competent evidence to support the plea as made. We think the court erred in sustaining the objections. This was not a case which involved any rights of an innocent holder for value, but the action was directly between the parties to the original transaction.



Some objection has been made to the sufficiency of the record presented. The irregularities complained of, we think, are not sufficient to justify us in discarding the record in considering the appeal.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1814. First Appellate District.—May 17, 1916.]

**WILLIAM T. GROSSE, Respondent, v. C. B. PETERSEN et al., Appellants.**

**CONTRACT—EXECUTION WITH REFERENCE TO SPECIAL CIRCUMSTANCES—MEASURE OF DAMAGES.**—Where a contract is entered into by the parties thereto with reference to special circumstances known to both parties, the damages recoverable for a breach of the contract are not only those arising naturally therefrom and according to the usual course of business, but also those which under the special circumstances connected with the transaction flowed from the breach.

**Id.—CONTRACT FOR MANUFACTURE OF SOAP—DAMAGES.**—The measure of the plaintiff's damage for the defendants' willful and wrongful violation of a contract for the manufacture of soap according to a secret formula furnished by the former, is, where it is shown that the defendants had knowledge that the purpose of the plaintiff was to permanently establish a market for a soap of superior merit and value to be manufactured for him in exact accord with such formula, the difference between the plaintiff's actual expenditures in creating a market for the soap, including the value of his own services, and the sum received by him from the sales made of the soap delivered up to the time that the market which he had created had been destroyed in consequence of the breach of the contract; and, where it is also shown that such defendants had converted the secret ingredient to their own use, the value thereof is to be added to the damage.

**Id.—EVIDENCE—EARNINGS OF PLAINTIFF.**—In such an action it is not error to permit evidence of plaintiff's average earnings while employed by third parties in work similar in character and extent to the work which for some fourteen months he did in creating a market for his soap.

**Id.—ACCEPTANCE OF INFERIOR SOAP—LACK OF WAIVER.**—The breach of such a contract is not waived by the ordering and acceptance of

soap after the plaintiff had knowledge of some complaints as to the efficacy of the soap, where such complaints were few and of a vague character.

**ID.—QUALITY OF SOAP—INSTRUCTION.**—In such an action it is not misleading to instruct the jury that if it was found that the defendant failed to furnish the plaintiff with "a high extra number one soap same quality as Pioneer Soap Company's Medallion soap," such failure constituted a breach of contract, where the evidence was confusing as to whether the basic ingredients employed in the manufacture of the soap in question were in anywise inferior to the basic ingredients usually employed in the manufacture of Medallion soap.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. L. T. Price, judge presiding.

The facts are stated in the opinion of the court.

Frank Otis, Mastick & Partridge, and Alan C. Van Fleet, for Appellants.

Wm. M. Abbott, Wm. M. Cannon, and Paul C. Morf, for Respondent.

**LENNON, P. J.**—In this action the plaintiff sued to recover the sum of forty thousand dollars as damages for the breach of a contract. Upon the verdict of a jury judgment was entered in plaintiff's favor in the sum of three thousand five hundred dollars. The appeal is from the judgment, and from an order denying a new trial.

Briefly stated the facts are these: The defendants were engaged in the business of manufacturing soap. The plaintiff was a soap expert and salesman, and for many years prior to the making of the contract in suit had been a successful dealer in soap and the Pacific Coast agent for soap manufacturers. Plaintiff was possessed of a secret formula for the manufacture of soap, containing an ingredient claimed by him to possess peculiar cleansing qualities, and the especial excellence of soap manufactured in accordance with his formula had been successfully demonstrated. Plaintiff entered into a contract with the defendants for the manufacture at a stipulated price of a laundry soap, to be known as Wil-Gro soap, which was "to be a high extra number one soap same quality as

Pioneer Soap Company's (defendant) Medallion soap,"—weighing from 5¾ to 7 ounces per bar when cured, and which was to be made and mixed according to plaintiff's formula as set out in the contract. The contract further covenanted that the defendants would not use the plaintiff's secret ingredient in the manufacture of any soap but that of the plaintiff.

The first count of the plaintiff's complaint alleged that he had expended in payment to the defendants for soap delivered to him under said contract, supposedly manufactured in accordance with his formula, the sum of \$4,167.10; that he had paid the sum of \$3,344.33 for the secret ingredient which was supplied to the defendants for the purpose of being used in the manufacture of the soap, and the sum of \$5,066 in the creation of a market for the commodity when manufactured; and then proceeded upon the theory that the plaintiff was damaged in the aggregate of those sums by the defendants' breach of the contract in furnishing an inferior soap not manufactured as agreed, which rendered futile the expenditures thus incurred.

The second count of the complaint fixed the plaintiff's damage at five thousand dollars because of the defendants' unauthorized use of the plaintiff's secret ingredient in the manufacture of their own soap.

The third count of the complaint called for damages in the sum of twenty-five thousand dollars, because of the alleged injury to the plaintiff's business and reputation as a soap dealer, and his diminished ability to make sales of his specialty.

The evidence adduced in support of the plaintiff's case tended to show that upon the execution of the contract he commenced to advertise and create a market for the soap to be manufactured for him by the defendants. This he continued to do until some time in April, 1912. During this time he ordered and received from the defendants approximately one hundred thousand pounds of soap supposedly made and mixed in conformity with the formula specified in the contract, for the manufacture of which he supplied to the defendants 6,390 pounds of the secret ingredient, which was 15 pounds in excess of the quantity necessary to fill plaintiff's orders if the soap had been manufactured according to the formula contained in the contract. The defendants did not manufacture this soap according to the agreed formula, but

used in such manufacture from 35 to 50 per cent only of the proportion of secret ingredient specified therein. They diverted large quantities of this ingredient to their own use, employing it in the manufacture of their own soap, and also retained in their possession after the completion of the plaintiff's orders about one thousand pounds thereof. The soap when received by the plaintiff was wrapped and boxed, and the plaintiff sold and shipped the same to his customers in the original packages, disposing during a portion of the year 1912 of some eighty-eight thousand pounds. Occasionally a customer of the plaintiff found fault with the soap upon the ground that it did not do the work claimed for it; but the plaintiff, knowing the efficacy of the soap when made according to his formula, and having implicit confidence in the business ability and integrity of the defendants, gave but little heed to the few complaints thus made until something like a year after the execution of the contract, when he discovered the fact above mentioned, that the defendants had employed in the manufacture of the soap a smaller proportion of the secret ingredient than specified in the formula. Thereupon the plaintiff ceased selling the article as Wil-Gro soap, disposing of it as ordinary soap at a reduced price, and still had on hand unsold a considerable quantity thereof.

The principal point urged in support of the appeal is that the evidence is insufficient to support the finding of the jury implied by the verdict that the plaintiff was damaged by the defendants' alleged breach of the contract in the sum of three thousand five hundred dollars, or any other sum.

Much of the briefs of the respective counsel is devoted to a discussion of the measure of damages; but upon that subject, and the sufficiency of the evidence to support the verdict, it will suffice to say that upon the whole the evidence shows that the contract in controversy was entered into by the parties thereto with reference to special circumstances known to both parties, and therefore the damages recoverable for a breach of the contract are not only those arising naturally therefrom and according to the usual course of business, but also those which under the special circumstances connected with the transaction flowed from the breach. (*McDonald v. Kansas City Bolt etc. Co.*, 149 Fed. 360, 365, [8 L. R. A. (N. S.) 1110, 79 C. C. A. 298]; *Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 264, [40 S. E. 920]; 3 Elliott on Contracts, sec. 2131.)

In the present case the circumstances surrounding and attending the making of the contract, which to an extent make and measure the damage suffered by the plaintiff for the undoubted breach of the contract, are briefly stated these: The contract was entered into between plaintiff and defendants with the purpose on the part of the plaintiff—which purpose was apparently known to the defendants—of permanently establishing a market for a soap of superior merit and value, which was to be manufactured for the plaintiff in exact accord with the formula specified in the contract. Upon the faith of the contract entered into the plaintiff expended much time, effort, and money in successfully creating a market for his soap, which presumably and evidently was intended to be of a permanent nature rather than a mere temporary expedient for the making of an immediate profit from the sale of the first lots of soap manufactured.

Under the rule stated, the measure of the plaintiff's damage for the defendants' willful and wrongful violation of the contract would, ordinarily and under the special circumstances narrated, be at the very least the difference between his actual expenditures, including the value of his own services, which he had been induced to make on the faith of the contract, and the sum received by him from the sales made of the soap delivered up to the time that the market which he had created had been destroyed in consequence of the defendants' breach of the contract. (*Cederberg v. Robison*, 100 Cal. 93, [34 Pac. 625]; *United States v. Behan*, 110 U. S. 338, [28 L. Ed. 168, 4 Sup. Ct. Rep. 81].) In the pursuit and accomplishment of his design, and the apparent purpose of the contract, the evidence shows that the plaintiff, upon the faith of the contract, expended in the aggregate the sum of \$10,577; and that prior to the decline and final destruction of the market which he had created for Wil-Gro soap he had received from the sales of the soap manufactured and delivered to him by the defendants the sum of \$6,942. The actual loss to him, therefore, in this aspect of the case was the sum of \$3,635; and in estimating his damage there must be added to this the further sum of \$675, the value of the secret ingredient wrongfully converted by the defendants to their own use. It will thus be seen that the evidence not only supports the verdict, but that the aggregate of the plaintiff's actual loss resulting from the defend-

ants' breach of the contract was much in excess of the sum awarded to him by the jury.

The trial court did not err in its ruling permitting evidence of plaintiff's average earnings, while employed by third parties, in work similar in character and extent to the work which for some fourteen months he did in creating a market for his Wil-Gro soap. Of course, the amount of such earnings in themselves did not fix the value of the plaintiff's time and labor expended upon the faith of the contract in controversy, but it was some evidence of the value of the plaintiff's services, and was therefore admissible for the purpose of assisting the jury in fixing the value of the same (1 Sedgwick on Damages, 9th ed., sec. 265).

We are not impressed with the point that the plaintiff waived the breach complained of, and the damages resulting therefrom, because he ordered and accepted soap from the defendants after he had heard some complaints from his customers that "it would not do the work." These complaints were, apparently, few and far between, and it was not until a year and more after the completion of the contract that he was positively and definitely informed that the defendants were not manufacturing the soap in accordance with the agreed formula. Even if the soap had been manufactured strictly according to the formula, it is not unlikely that there would have been some slight complaint that at times it did not fully measure up to the representations made for it; and a few vague complaints made of the soap delivered to the plaintiff were not in our opinion sufficient as a matter of law to charge the plaintiff with knowledge of the breach of the contract, and thereby operate to transform his subsequent acceptance of the soap into a waiver of the original terms of the contract.

The trial court, among other things, in effect instructed the jury that if it was found that the defendants failed to furnish the plaintiff with "a high grade extra number one soap same quality as Pioneer Soap Company's Medallion soap," such failure constituted a breach of the contract; and it is now insisted that there is no evidence that the basic ingredients employed in the manufacture of the plaintiff's Wil-Gro soap were in anywise inferior to the basic ingredients usually employed in the manufacture of Medallion soap, and that there-

fore the tendency of the instruction in question was to mislead the jury, and was consequently prejudicially erroneous.

While the evidence upon this phase of the case is more or less confusing, there was some evidence that "there was a fixed formula for the Medallion soap" which was varied from in the manufacture of the "Medallion soap" which was employed as a basis for the manufacture of the plaintiff's Wil-Gro soap. True, it was the claim of witnesses for the defendants that the variation from the formula for the manufacture of Medallion soap was an immaterial one, which did not injuriously affect its quality and value as a base for the manufacture of the plaintiff's soap; but, upon the other hand, there is evidence to be found in the record tending to show that "Medallion soap" was not a number one piece of soap because the ingredients which went into it consisted in part of "grease, a cheap grade of resin not the best, and instead of the soap getting two washes like the ordinary soap it was only put through one. It wasn't cleansed properly, and it was finished very poorly." It is not entirely clear to us whether the latter testimony had reference to the Medallion soap ordinarily manufactured by the defendants according to the formula fixed therefor, or was intended to apply to the "Medallion soap" which was especially used as a base for the manufacture of the plaintiff's soap. In the presence of this uncertainty in the evidence we are not prepared to say that the question, as to whether or not the defendants had complied with the contract in the particular stated in the instruction complained of was improperly submitted to the jury.

The remaining points urged in support of the appeal are more or less involved in those previously discussed; they have therefore in effect been disposed of and need not be now adverted to.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1916.

[Civ. No. 1481. First Appellate District.—May 18, 1916.]

**H. M. FERRAR, Respondent, v. THE WESTERN ASSURANCE COMPANY (a Corporation), Appellant.**

**FIRE INSURANCE—PAROL CONTRACT—VALIDITY OF.**—Where an insurance agent authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy.

**LD.—AGENCY TO PROCURE INSURANCE—EVIDENCE—SCOPE OF AUTHORITY.** Where a soliciting insurance agent is in the first instance given authority to place insurance, and such authority is thereafter extended to keeping the property insured from year to year, he thereby becomes the general agent of the insured with authority to insure the property and to keep it insured, and, as an incident thereto, to accept notice of cancellation of a policy and procure insurance in another company.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

**J. F. Riley, for Appellant.**

**Bacigalupi & Elkus, and Jewel Alexander, for Respondent.**

**KERRIGAN, J.**—This is an appeal from a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial in an action brought against the defendant to recover the sum of one thousand dollars, the amount of a fire insurance policy claimed by plaintiff to have been issued by the defendant upon certain furniture belonging to the former's assignor.

Several years before the fire which destroyed the furniture in question, Mrs. Margaret M. Plier, its owner, had authorized Clarence Coleman, an insurance broker, to place one thousand dollars insurance thereon, the property being contained in a certain hotel in San Francisco. Coleman did so, selecting the St. Paul Fire and Marine Insurance Company. At that time, and up to the time of the fire, Mrs.

Plier was carrying other insurance upon the furniture in the sum of five hundred dollars, which was placed independently of Coleman. Each year, when the one thousand dollar policy was about to expire, Coleman would renew it, and Mrs. Plier would pay the premium. On one occasion, a small loss by fire having occurred, he attended to the matter of its adjustment in so satisfactory a manner to the insured that she told him to thereafter take care of her insurance and to keep her covered in good companies in the sum of one thousand dollars. On May 15, 1911, the St. Paul Fire and Marine Insurance Company notified Coleman in writing that after an examination of the premises in which the insured property was situated it felt constrained to cancel its policy, and thereby gave Coleman the five days' notice of cancellation as required by the terms of the policy. Coleman immediately attempted to see Mrs. Plier in order to obtain possession of the policy for the purpose of returning it to the company, whereupon she would be entitled to be repaid the unearned premium thereon. Failing to see Mrs. Plier, Coleman, on May 18, 1911, offered to the defendant company this insurance. The latter's "counterman," who was authorized to accept insurance, refused to take the responsibility in this instance of accepting the risk, and referred Coleman to the manager of the company, one Miller. After some persuasion on the part of the broker, Miller agreed to take the insurance, and on May 20th a written application was made to the company. On May 27th, Coleman not having received the policy, telephoned to the office of the defendant and inquired about it, and was informed that the policy was ready but not signed, and that it would be sent over to him on the following Monday morning. Early that Monday morning (May 29, 1911), the fire occurred and the property insured was totally destroyed. From May 20th, when the application for the insurance was left with the company, up to the time of the fire, the defendant appears to have considered that it was carrying the risk. Entries in its books made in the ordinary course of business so indicated, and this insurance was included in a statement made to the home office of the company of business recently transacted, and after the fire a statement was sent to Coleman showing that he had been charged with the premium on this insurance.

We do not doubt from all the circumstances of the case that the finding of the court that this property was covered by a parol contract of insurance at the time of the fire is amply sustained by the evidence. Such contracts under similar circumstances are not uncommon. (*Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, [27 L. R. A. 136, 38 N. E. 1126].) They are valid and enforceable in this state. (*Harron v. City of London Fire Ins. Co.*, 88 Cal. 16, [25 Pac. 982]; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 218, [14 Pac. 786]; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, [106 Pac. 720].)

"If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy." (*Western Assurance Co. v. McAlpin*, 23 Ind. App. 220, [77 Am. St. Rep. 423, 55 N. E. 119].)

The only really serious question in this case is whether or not Clarence Coleman was acting within the scope of his authority in placing this insurance. Notwithstanding that the property which it covered according to the findings of the court—based on sufficient evidence—was reasonably worth approximately two thousand five hundred dollars, its owner intended to carry no more than one thousand five hundred dollars insurance upon it, of which she had personally attended to placing five hundred dollars, and was relying upon Coleman to take care of the remainder. At the time of the fire she knew nothing about the contemplated cancellation or the new insurance. Upon learning of the fire, and of the condition of her insurance, she filed proofs of loss with all three companies. From the other companies she obtained in settlement of the loss approximately the amount of the face of the policies, but the defendant denied responsibility upon its policy and refused to pay, whereupon the insured assigned her claim to the plaintiff, who at once commenced this action.

We think the defendant is liable. Perhaps when Coleman placed the first insurance for Mrs. Plier he was merely an insurance solicitor, whose authority was quite limited, but later, as we have seen, she extended his authority by telling him "to take care of her insurance and to see that she was covered to the amount of \$1,000." At another place in the record she is shown to have testified as follows:



"A. About the Western Assurance, I never told him what company to insure me in. I just said, 'Insure me for \$1,000,' and that was all. As long as it was covered, that is all I cared.

"Q. As long as it was covered?

"A. Yes, sir.

"Q. It says, 'I looked upon him as a solicitor only.'

"A. I don't know about solicitor—I only told him to insure me and keep me insured.

"Q. To keep you insured?

"A. To keep me covered—that is all I cared—as long as I was in a good company."

Coleman's testimony we think tends to corroborate the testimony of Mrs. Plier; but we are satisfied that the direction by Mrs. Plier to Coleman just referred to made him more than a mere soliciting insurance agent, and constituted him, as found by the court, her general agent to keep her insured to the extent of one thousand dollars in respect to the property here involved. Being her general agent for this purpose we think he was authorized as an incident of his employment to accept and to act upon a notice of cancellation. (*Stevenson v. Sun Ins. Office*, 17 Cal. App. 280, [119 Pac. 529].) "A general agent with power to insure property and to keep it insured may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company." (22 Cyc. 1447; *Aetna Ins. Co. v. Benno*, 96 Miss. 172, [50 South. 563]; *Phoenix Ins. Co. v. State*, 76 Ark. 180, [6 Ann. Cas. 440, 88 S. W. 917]; *Schauer v. Queen Ins. Co.*, 88 Wis. 561, [60 N. W. 994]; *Todd v. German-American Ins. Co.*, 2 Ga. App. 789, [59 S. E. 94].)

The record does not show upon what ground the insured, after the cancellation of the policy, obtained a settlement of her claim against the St. Paul company. Evidently for some good reason it deemed itself responsible on the policy and paid the loss. The trial court found that the policy in that company had been canceled. However, the circumstances of that transaction are not before us, and therefore have no bearing upon the determination of this case. Here it appears that Coleman, in the careful discharge of his duty as general agent, effected a valid contract of insurance with the defendant upon his principal's property, the obligation

of which is not dependent upon the transaction with the St. Paul company.

But even if Coleman were not the general agent for the assured, still the finding of the court as to his authority would have to be sustained on the theory that his action in procuring the policy in the defendant company was ratified by his principal. In filing her claim of loss and demanding payment, she ratified the action of her agent. The authorities seem to hold that a ratification, though made subsequent to a loss, is valid.

In the case of *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323, [85 N. E. 1087], an agent was instructed by his principal to carry a certain amount of insurance on each of two certain barges. The agent, being in some doubt as to the amount in force on the barges, and endeavoring to carry out his instructions, took out other insurance, and advised his principal of what he had done. Upon discovering that he had contracted for a larger amount than his instructions warranted—which was on the following day—he returned the policies to the insurance company, requesting in effect that the transaction be treated as if the policies had never been issued, and so be without premium charge. This the defendant refused, but suggested that the insurance would be canceled at short rates. With the proposition in this shape one of the barges was destroyed, whereupon the owner tendered defendant the premium upon the policy issued, and later duly presented proof thereunder. In that case the agent does not seem to have been given as wide a power as the broker here; and while the opinion proceeds upon the theory that under the circumstances of the case the defendant was estopped from denying its liability, still to so hold it was necessary—and accordingly the court did hold—that the owner had a legal right to ratify the acts of his agent and accept the contract even after the occurring of the loss.

In the case of *Todd v. German-American Ins. Co.*, 2 Ga. App. 789, [59 S. E. 94], the court say that assuming that Turpin (the agent) acted for Todd, and procured from the defendant a policy of insurance in Todd's favor, and paid the premium or became responsible to pay the same, Todd could, after the fire, upon discovery of the fact that Turpin had assumed to act for him, ratify the contract and hold the



insurance company upon it. The court observes that it must be admitted that in the case of a ratification the parties do not generally stand upon even terms, since the principal may always elect to ratify the act if it is for his benefit, and disavow it if it is to his injury, but this consequence has never been allowed to overcome the force of the general doctrine.

In the case of *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, [55 Pac. 905], the defendant took out insurance in favor of an estate in which he was an heir. Later, upon demand, he refused to pay the premium, whereupon suit was commenced to compel him so to do. In sustaining a judgment against him the court thus states the law: "Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act even after the occurrence of a loss." (See, also, 1 Joyce on Insurance, sec. 642; 1 May on Insurance, 4th ed., sec. 122A; 2 Clement on Fire Insurance, 481; 1 Wood on Fire Insurance, sec. 136, p. 320.)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 17, 1916, and the following opinion then rendered thereon:

**THE COURT.**—The application for a hearing in this court after decision by the district court of appeal of the first appellate district is denied.

In denying the application we deem it proper to say that we do not express any view on the question of ratification discussed in the opinion. A decision on that question is not essential to a determination of the case, in view of what is correctly held in the opinion as to the status and authority of Coleman.

[Civ. No. 1829. First Appellate District.—May 19, 1916.]

**JULIA MCCARTHY, Respondent, v. PATRICK HOLLAND, as Administrator, etc., Appellant.**

**JOINT TENANCY—TRANSFER OF SAVINGS BANK ACCOUNT—RIGHT OF SURVIVORSHIP.**—Where a depositor of money in a savings bank, while ill, and about a month previous to her death, executes and delivers to her niece, for whom she had great affection and regard, a writing directing the bank to transfer the account to an account in the names of herself or such niece, "payable to either or to the survivor," and accompanies such delivery with the pass-book, and on the following day the bank upon presentation of such document and the pass-book makes a transfer of the account as directed, and issues a new pass-book which the aunt directs the niece to keep, and on the same day the niece makes a withdrawal from such account for her own personal use, with the knowledge and concurrence of the aunt, such writing, and the acts and conduct of the parties at the time of and after its execution, constitute the parties joint tenants of the fund with the right of survivorship in the niece upon the death of the donor.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

**W. E. Cashman, and J. J. Dunne, for Appellant.**

**William A. Kelly, for Respondent.**

**RICHARDS, J.**—This is an appeal from a judgment in favor of plaintiff, and from an order denying a new trial in an action originally commenced against the Hibernia Savings and Loan Society to recover a sum of money on deposit with that institution, and by which the defendant Patrick Holland, administrator, etc., was interpleaded upon his assertion of an adverse claim to said deposit.

The facts of the case are substantially undisputed and may be summarized as follows: Julia McCarthy, the plaintiff herein, was the niece of Mary Anne Holland, and between them existed strong ties of confidence and affection. On and prior to April 20, 1911, Mary Anne Holland was the owner

as her separate property of a sum of money in excess of six thousand dollars, which was on deposit with the Hibernia Savings and Loan Society. On said last-named day Julia McCarthy was at the home of Mary Anne Holland, who was quite ill and who, in fact, had but a short time to live, when the latter caused a notary public to be called for, and upon his arrival, and in his presence, executed and delivered to the plaintiff the following writing:

"San Francisco, Cal., Apr. 14, 1911.

"The Hibernia Savings & Loan Society, San Francisco, Cal.

"Gentlemen.—

"Please transfer the balance due on my account No. 193-352 to an account in the names of Mary Anne Holland or Julia McCarthy, payable to either or to the survivor.

"MARY ANNE HOLLAND.

"Witness: A. G. SALA.

414859

her

"JULIA X MCCARTHY.

mk.

"Witness: SOULLY."

At the time of the delivery of this document to the plaintiff, Mary Anne Holland stated to her, and to those present, that she wanted Mrs. McCarthy to have the money which was on deposit with the Hibernia Bank, expressing at the same time her affection and regard for her; and she also and on that day handed to her the pass-book showing the fact and the amount of the deposit. On the following day the plaintiff presented to the Hibernia Savings and Loan Society the above document, together with the pass-book of Mary Anne Holland, and thereupon the bank closed the individual account of Mary Anne Holland and opened a new account, in which the sum on deposit formerly to the credit of Mary Anne Holland was made payable to "Julia McCarthy or Mary A. Holland, to either or to the survivor of them." The bank also issued and delivered to the plaintiff a new pass-book showing such deposit, which the plaintiff carried back to Mrs. Holland, who directed her to keep it. On the same day the plaintiff drew from said account the sum of five hundred dollars, which she applied to her own uses with the knowledge and full concurrence of Mrs. Holland. On the 7th of May, 1911, Mary Anne Holland died, and there-

after Patrick Holland was appointed administrator of her estate, and as such administrator made demand upon the Hibernia Bank for the amount of said deposit. This demand caused the bank to withhold the money from both claimants until this suit was brought, when it relieved itself from liability by its interpleader of the parties. Patrick Holland, as administrator of the estate of Mary Anne Holland, deceased, having been thus substituted as party defendant, filed an answer and cross-complaint, setting up title to the deposit in question. Upon the issues thus joined plaintiff recovered judgment, and from it, and the order denying the motion for a new trial, this appeal has been taken.

The appellant devotes the larger portion of his brief to the contention that the evidence does not sustain the finding of the court that it was the intention of Mary Anne Holland on the date of the instrument in question, to transfer to Julia McCarthy the money in the Hibernia Bank at the time and by means of the execution and delivery of the said instrument; but in this we think the appellant is in error, and that there is ample evidence that such was her intention, and that the relation of the parties was such as to make it desirable and proper that such intention should be given effect if a fair construction of the instrument in question will produce that result.

The appellant, however, insists that the writing cannot be given such construction, for the reason that it shows upon its face, and as construed in the light of the subsequent conduct of the parties to it, that Mary Anne Holland did not surrender dominion and control over the fund in question to such an extent as to satisfy the requirements either of a valid gift *inter vivos*, or of a trust in said fund for plaintiff's benefit, citing numerous cases in support of such contention. We are of the opinion, however, that the case of *Booth v. Oakland Bank of Savings*, 122 Cal. 19, [54 Pac. 370], as recently adopted and applied by this court in the case of *Drinkhouse v. German Sav. & Loan Society*, 17 Cal. App. 162, [118 Pac. 953], has direct application to the case at bar, and that the instant case presents an even stronger claim for the application of the principles therein enunciated than either of the foregoing cases, and brings this case practically within the reasoning and conclusions of Chief Justice Beatty in the case of *Sprague v. Walton*, 145 Cal. 228-233, [78 Pac. 645].

The plaintiff herein was put in a position which enabled her to withdraw from the Hibernia Bank the entire amount of this deposit if she so desired during the lifetime of Mary Anne Holland; and that it was the undoubted intention of said Mary Anne Holland that the plaintiff should have such absolute control over these funds is evidenced, not only by her acts and statements at the time of the transfer, but afterward, when she was informed by the plaintiff that she had withdrawn a portion of the fund and applied the same to her own individual uses.

We are further of the opinion that the evidence educed at the trial brings this case within the purview and intent of section 16 of the Banking Act (Stats. 1911, p. 1003); and that the writing in question, taken in connection with the acts and conduct of the parties at the time of and after its execution, was sufficient to constitute the plaintiff and Mary Anne Holland joint tenants in said fund with the right of survivorship in the latter upon the death of the donor. In such case her title to the whole of said deposit at the time this action was brought would be complete (*Clary v. Fitzgerald*, 155 App. Div. 659, [140 N. Y. Supp. 536]).

For the foregoing reasons we are of the opinion that the judgment is supported by the evidence, and that the court otherwise committed no error justifying the granting of a new trial.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 17, 1916.

[Civ. No. 1455. Second Appellate District.—May 20, 1916.]

**CHARLES METTLER**, Respondent, v. **WARREN VANCE**  
et al. (a Copartnership), etc., Appellants.

**SALE—FAILURE TO DELIVER WITHIN TIME—RESCISSION.**—Where a contract for the sale of an automobile provides for the delivery of the machine within thirty days from the date of the contract, and the vendor fails to make such delivery within such time, and time is of the essence of such contract, the vendee is entitled to rescind and recover whatever he has paid under the contract.

**ID.—BREACH OF CONTRACT—TIME OF PERFORMANCE.**—A contracting party is not excused from performing his contract within the time agreed upon, further than that in certain contracts failure to perform strictly to contract, as to time, does not authorize the other party to rescind.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.  
N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

William Ellis Lady, for Appellants.

Carroll E. King, for Respondent.

**SHAW, J.**—This is an appeal by defendants from a judgment rendered in favor of plaintiff, and from an order denying their motion for a new trial.

As alleged in the complaint, plaintiff and defendants, on October 4, 1912, entered into a written contract whereby the latter agreed to sell and deliver to plaintiff, within thirty days from said date, an automobile described therein as a Model No. 22, 40 h. p., Marquette roadster, the agreed price of which, with extra equipment, was fixed at \$3,223.50, upon which price defendants allowed plaintiff the sum "of \$723.50 for advertising," and seven hundred dollars for a Wescott automobile owned by him and which he then and there transferred and delivered to defendants, and also paid them one hundred dollars in cash, all of which sums were by defendants acknowledged as being received and applied upon the purchase price of the Marquette roadster sold and agreed to

be by defendants delivered to plaintiff. By the terms of the agreement plaintiff agreed to pay to defendants the balance of the purchase price of said car, namely, one thousand seven hundred dollars, when the Marquette roadster should be delivered to him. Defendants neglected and refused to deliver the Marquette roadster as agreed; whereupon plaintiff, on November 6th, demanded the return to him within three days of the Wescott car, together with the one hundred dollars in cash, transferred and paid on account of said purchase price, which demand was refused. Thereupon plaintiff brought this suit, praying for a rescission of the contract, and the return of the Wescott car and the one hundred dollars so transferred and paid to defendants.

While inartificially drawn, we are of opinion the complaint, the substance of which is stated, was sufficient as against the general demurrer interposed by defendants. The result of defendants' refusal to deliver the car in accordance with the contract constituted a failure of the consideration upon which plaintiff delivered the Wescott car to them. (Civ. Code, sec. 1689, subd. 2.) Moreover, a rescission on the part of defendants was implied by their refusal to comply with the contract, in which plaintiff acquiesced, thus effecting a rescission by consent. (*Cromwell v. Wilkinson*, 18 Ind. 365.) Hence, the parties stood toward each other as though no contract existed, and defendants being in possession of plaintiff's property, to which they had no right or title, and refusing to return and redeliver the same, he was entitled to maintain an action therefor.

Appellants devote a large part of their brief to a discussion as to whether or not, as found by the court, time was the essence of the contract, without which they claim it could not be rescinded. According to our view of the complaint, as stated, this question becomes unimportant, for "neither at law nor in equity is a contracting party excused from performing his contract within the time agreed upon, further than that in certain contracts failure to perform strictly according to contract, as to time, does not authorize the other party to rescind." (*American Type etc. Co. v. Packer*, 130 Cal. 459, [62 Pac. 744].) Strictly speaking, the right of plaintiff to rescind depends not upon the question as to whether or not time was mentioned in the contract as being the essence thereof, but whether defendants' failure to per-

form the contract was a breach of a substantial part thereof for which damages would be an inadequate compensation. (*Harlan v. Stufflebeem*, 87 Cal. 508, [25 Pac. 686].) Upon evidence sufficient to justify the same, the court found that time was the essence of the contract. Conceding that before one party can rescind he must place the other in *statu quo*, such rule has no application here, since plaintiff under the terms of the contract had received nothing whatsoever from defendants.

The nature of the contract was such that damage due to delay in the performance thereof, so far as it affected plaintiff, was not capable of ascertainment (Civ. Code, sec. 1492), and hence defendants' offer of performance at a later date, and after the commencement of this suit, thus disregarding the question of time found by the court to be a substantial part of the contract, imposed no duty upon plaintiff to accept the tardy offer, but left him free to pursue his remedy by rescinding the contract and recovering the property, or the value thereof, which he had transferred to defendants on account of said purchase.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1916.

---

[Civ. No. 1834. First Appellate District.—May 22, 1916.]

**PACIFIC PORTLAND CEMENT COMPANY, CONSOLIDATED** (a Corporation), Respondent, v. **A. W. REINECKE**, Appellant.

**PROMISSORY NOTE—CONSIDERATION FOR INDORSEMENT—CONTEMPORANEOUS EXECUTION—FINDINGS—PRESUMPTIVE EVIDENCE OF INDORSEMENT.**—An indorsement of a promissory note is itself presumptive evidence of a consideration therefor and that it was made contemporaneously with the execution of the note, and such evidence may be resorted to in aid of findings to such effect in an action to recover upon the indorsement, even though such presumption stands alone and is opposed by direct evidence to the contrary.

**Id.—EVIDENCE—DISPUTABLE PRESUMPTION—WEIGHT AS AGAINST ADMITTED OR PROVED FACT—EXCEPTION.**—The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all the evidence including the presumption.

**Id.—ACTION ON INDORSEMENT OF PROMISSORY NOTES—EVIDENCE—PRESENCE OF NAMES AT TIME OF DELIVERY—UNOBJECTIONABLE QUESTION.**—In an action against the indorser and guarantor of two promissory notes, a question addressed to a witness for the plaintiff as to whether at the time the notes were delivered to him the names were written on the back of the notes, is not objectionable as leading and calling for the conclusion of the witness.

**Id.—INDORSEMENT OF SURRENDERED NOTES BY DEFENDANT—IMPROPER CROSS-EXAMINATION.**—In such an action there is no error in sustaining an objection to a question addressed to a witness for the plaintiff on cross-examination, as to whether or not the defendant had indorsed certain notes for the maker of the notes in question, which were surrendered and canceled upon the execution of the notes in suit, where nothing had been developed upon the direct examination of the witness which warranted the testimony.

**Id.—INDORSEMENT OF OTHER NOTES—PROPER CROSS-EXAMINATION.**—There is no error in such an action in permitting the defendant to be cross-examined over objection concerning the fact that he was indorsing a great many notes for the maker about the time of the execution of the indorsement and guaranty of the notes in suit, where he had testified on direct examination that he had indorsed the notes after their execution and delivery as an accommodation to the plaintiff.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

F. H. Dam, for Appellant.

Pillsbury, Madison & Sutro, and Felix T. Smith, for Respondent.

**LENNON, P. J.**—On September 24, 1910, the Metropolis Construction Company executed to the plaintiff two promissory notes for one thousand three hundred and seven dollars and two thousand dollars, respectively, upon which the plain-



tiff secured a judgment against the defendant, as the guarantor and indorser of the notes, in the sum of \$3,680.25, which included interest from the date of the notes. It is an admitted fact in the case that the defendant signed both notes on the back thereof at the same time in the dual capacity of guarantor and indorser.

The plaintiff's complaint sets forth four causes of action. It is conceded that the defendant's general demurrer should have been sustained to the second and fourth counts, upon the ground that they did not state a cause of action. It is not disputed, however, that the remaining counts were proof against demurrer, and sufficient as a matter of pleading to support the judgment if the points made for a reversal—the insufficiency of the evidence and errors of law occurring during the trial—be found untenable. We need not therefore concern ourselves with the error of the trial court in overruling the defendant's demurrer to the second and fourth counts.

The existence and sufficiency of the consideration to support the defendant's guaranty and indorsement of the notes was the paramount issue in the case. Incidentally the pleadings presented the issue as to whether or not the guaranty and indorsement were made contemporaneously with, or subsequent to, the execution of the notes. It was the theory of the defendant's defense to the action that he had made the indorsement and guaranty after the delivery of the notes by the maker to the plaintiff, and that therefore he was but an accommodation indorser; and that, in the absence of a consideration independent of the making of the notes, he was not liable to the plaintiff, the party alleged to have been accommodated. The notes in suit were made and dated September 24, 1910, and the trial court found that upon the execution of the notes, and on the date thereof, the defendant "by a writing upon said promissory note waived demand, notice of nonpayment and protest of said promissory note, and guaranteed the payment thereof and indorsed said promissory note, and thereupon said promissory note was delivered to the plaintiff herein, and the plaintiff accepted the same for a valuable consideration,"—a similar finding being made for each note. This finding we think is sufficiently supported by the evidence. The indorsement itself was presumptive evidence of a consideration therefor, and also of the fact that it

was made at the time and place of making the note. (Civ. Code, secs. 1614, 1615, 1304; Code Civ. Proc., sec. 1963, subds. 21, 22, 39.) In addition to this presumptive evidence, the record discloses direct evidence adduced upon behalf of the plaintiff, to the effect that the defendant's name was signed to the indorsement and guaranty upon each of the notes when they were delivered to the plaintiff. Conceding that it was shown upon cross-examination of the plaintiff's witness that the latter evidence was either without foundation or rested upon hearsay, nevertheless, not having been objected to upon those grounds in the first instance, nor followed by a motion to strike out upon discovery of its defect in either or both particulars, such evidence may be resorted to in support of the findings as made. (*Morrell v. Morgan*, 65 Cal. 575, [4 Pac. 580]; *Janson v. Brooks*, 29 Cal. 214, 223; *Curia v. Packard*, 29 Cal. 194, 197; *Prentice v. Miller*, 82 Cal. 570, 572, [23 Pac. 189]; *Williams v. Hawley*, 144 Cal. 97, 102, [77 Pac. 762].)

In further support of the trial court's finding the record shows testimony of the defendant himself, given upon cross-examination, which we think tended to show that the party accommodated was the maker of the note, the Metropolis company, and not the plaintiff. In this behalf the testimony of the defendant was to the effect that at or about the time of the execution of the notes in controversy he had indorsed a number of other notes for the Metropolis company; that he was a friend of Mr. Emille, who organized the Metropolis company; that the defendant owned stock in the company, and that he indorsed and guaranteed the notes in controversy "to assist Mr. Emille with his business."

The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor, may be resorted to in aid of the findings, even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption. (*People v. Milner*, 122 Cal. 171, [54 Pac. 833]; *Adams*

v. *Hopkins*, 144 Cal. 19, 36, [77 Pac. 712]; *Moore v. Gould*, 151 Cal. 723, 726, [91 Pac. 616].) Therefore, giving all the weight and credence contended for by counsel for the defendant to the evidence adduced in support of the defense made, there still remains a substantial conflict in the evidence which, under the familiar rule, cannot be availed of upon appeal to disturb the findings of the trial court.

The error, if any, in the ruling of the trial court refusing to strike out the answer of a certain witness given in response to a question propounded by the court itself, was, we think, rendered harmless upon further cross-examination of the witness by counsel for the defendant, which called for and elicited a repetition of the testimony now claimed to be immaterial and incompetent.

If the record clearly showed, as counsel for the defendant insists, that the repetition of the testimony complained of was elicited by the further questioning of the court, and not by the further cross-examination of counsel, then of course it would not have been incumbent upon him to make a second objection, and his failure to do so would not be considered as a waiver of the objection previously made. The record, however, does not so show. The question complained of appears to have been interjected by the court during the cross-examination, and from the break in the text which appears at the conclusion of the question, the answer, and the motion to strike out, it is fairly inferable that the repetition of the testimony was provoked by the further cross-examination of counsel for the defendant. In any event, the text of the record upon the point in question is ambiguous; and in the face of such ambiguity it cannot be said that the appellant has sustained the burden which he must assume upon appeal to show prejudicial error in the ruling of the trial court.

The question "At the time the note was delivered to you were those names written on the back?" propounded to the plaintiff's witness, Henderson, was not objectionable upon the grounds that it was leading, and called for a conclusion of the witness. The mere fact that the question could be answered by "Yes" or "No" did not make it leading (*People v. Jones*, 160 Cal. 358, [117 Pac. 176]; and obviously the presence or absence of the names on the note at the time stated called for a fact and not a conclusion; and it is equally obvious that the word "delivered," as employed in the ques-

tion, related to the manual transfer of the note, and did not call for the conclusion of the witness as to whether or not there had been a legal delivery.

There was no error in the ruling of the trial court sustaining an objection to a question put to the witness Henderson upon cross-examination, which called for testimony as to whether or not the defendant had indorsed certain notes of the Metropolis company which had been surrendered and canceled upon the execution of the notes in suit. Up to the time of the ruling complained of, nothing had been developed upon the direct examination of the witness which warranted the cross-examination in question. As the trial court stated when making its ruling, the testimony sought to be elicited by the question objected to would perhaps have been pertinent if counsel for the defendant had not successfully insisted on the striking out of certain testimony elicited upon the direct examination of the witness, to the effect that the credit man of the plaintiff had instructions to accept no notes from the Metropolis company unless indorsed by the defendant, coupled with a waiver of protest signed by him. Not being cross-examination, it is not apparent that the testimony objected to was otherwise relevant or material to the issues raised, either by the pleadings, or the evidence adduced in the case, up to the time of the ruling.

Decidedly different were the circumstances attending the ruling of the trial court permitting the defendant to be cross-examined over objection concerning the fact that he was indorsing a great many notes for the Metropolis company about the time of the execution of the notes and the indorsement and guaranty in suit. In this behalf, the record shows the testimony of the defendant upon direct examination in part to be to the effect that he had indorsed and guaranteed the notes in suit, after their execution and delivery, at the request of an unidentified person who claimed to be the representative of the plaintiff, and that he signed the indorsement and guaranty merely as a matter of accommodation to the plaintiff. It is apparent upon a reading of the entire cross-examination, that the question objected to was intended primarily to be preliminary to other questions, which were designed to discredit the defendant's recollection of the circumstances preceding and attending the presentation of the notes in suit to him for his indorsement and guaranty.

Obviously, therefore, the question complained of was proper cross-examination; and the fact that it may have tended in a measure to support the inference fairly deducible from other evidence in the case that the party accommodated by the indorsement and guaranty was the Metropolis company, and not the plaintiff, did not make it any the less proper cross-examination.

In answer to the suggestion that no foundation was laid for the testimony elicited by the question immediately under consideration, it will suffice to say that if a foundation was necessary the lack of it was not made a ground of the objection.

This in effect disposes of all the points made in the case. The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 20, 1916.

A.

---

[Crim. No. 470. Second Appellate District.—May 22, 1916.]

THE PEOPLE, Respondent, v. W. R. DEATRICK,  
Appellant.

**CRIMINAL LAW — RAPE — EVIDENCE — CROSS-EXAMINATION OF PROSECUTRIX.**—In prosecutions for the crime of rape, while it is the duty of the trial court to exercise its discretion in the direction of permitting a very liberal, complete, and comprehensive cross-examination to be made of the prosecutrix, the mere fact that such discretion is not resolved as fully as it might have been in defendant's favor, does not justify a reversal of the judgment.

**ID.—IMPOTENCY OF DEFENDANT—PROPER CROSS-EXAMINATION.**—Where the defendant had introduced the testimony of two physicians tending to show that he was deficient in sexual power, and had also so testified in his own behalf, it is not error to permit the district attorney on cross-examination to ask him as to whether subsequent to the filing of the information, while staying at the house of a friend, he had not gone to the door of a woman's bedroom and asked permission to go into the room, saying: "I just want to see if I can raise my passions."

**ID.—IMPOTENCY—QUESTION FOR JURY.**—It is for the jury to say whether the defendant was impotent and utterly incapable of performing the act with which he was charged.

**ID.—ILLICIT RELATIONSHIP OF PROSECUTRIX WITH THIRD PERSON—EXCLUSION OF LETTERS—LACK OF PREJUDICE.**—It is not prejudicial error to refuse to admit in evidence certain letters and cards of an intimate and confidential tenor, which passed through the mails between a third person and the prosecutrix, where it is shown by other evidence that the latter sustained illicit relations with such person.

**ID.—WILLINGNESS OF DEFENDANT TO SUBMIT TO PHYSICAL EXAMINATION—IMPROPER CROSS-EXAMINATION—INSTRUCTION TO DISREGARD—LACK OF PREJUDICE.**—It is error to ask the defendant on cross-examination as to whether he would be willing to submit himself for examination to a physician whom the court might select for the purpose of determining the condition of his sexual organs, but such error is not prejudicial, where the jury is instructed to disregard the testimony.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Veitch & Richardson, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**JAMES, J.**—Defendant was convicted of the crime of rape, and sentenced by the trial court to serve a term of twenty-five years' imprisonment at San Quentin. The appeal is from the judgment, and from an order denying a motion for a new trial.

The act which was denounced by the information as making out the crime charged was alleged to have been accomplished with one Amy Deatrick, the adopted daughter of the defendant. It is alleged in the information that the child was of the age of fourteen years. It appears that the girl was brought into the family of the defendant by adoption when she was about the age of five years. The family lived at various places during the years succeeding the adoption of the child, and finally took up their residence at Belleflower in Los Angeles County, where the defendant engaged in the busi-

ness of raising poultry. The house in which they lived was a small building divided into three rooms. The household then consisted of defendant, the adopted child, and the defendant's wife. The child was sent to school, and was also provided with musical instruction by the defendant. The defendant hired a young man named Fay Detrick, who was not related to him in any way, although bearing a similar name. This young man occupied one of the rooms in the little house. In another of the rooms were two beds, in one of which defendant's wife and the little girl habitually slept, and the other, which was a single bed, the defendant used. After Fay Detrick had been in the house for about a month, or a little over, a dispute arose between the husband and wife which finally resulted in the wife leaving and going to the city of Los Angeles. The adopted daughter accompanied her, and neither of them afterward returned to the defendant's place. It was some time before the defendant learned the whereabouts of his wife and the girl, and before he had been able to see them he was arrested on the charge made by the information in this case. The theory upon which counsel for the defense presented their case was that this defendant was wholly innocent of the crime charged, and that his prosecution was brought about by his wife and the girl, through a spirit of revenge, and for the purpose of protecting Fay Detrick, with whom both Mrs. Deatrick and the girl Amy had sustained illicit relations. It was sufficiently shown by the admissions of Fay Detrick on the witness-stand that he had had sexual intercourse with Amy Deatrick, while he was working for the defendant at the Belleflower place. It was also shown that after Mrs. Deatrick and the girl came to the city of Los Angeles, Fay Detrick had visited them at their apartments, and had upon three occasions stayed at the apartments all night. However, the young girl gave testimony at the trial and directly charged that the defendant, not only on the day fixed in the information, but on a number of prior occasions, had sustained intimate relations with her. She said that she objected to these relations, but that they were insisted upon by the defendant. She did not deny having occupied the same bed with Fay Detrick while the latter was working for the defendant, but she claimed that this was with the permission and at the suggestion of the defendant himself. Mrs. Deatrick, who, after she left her husband, set up the claim that she had never been married to him,

was not called as a witness, and did not testify in the case. It was shown, in order to illustrate the erotic tendency of the defendant's mind, that he had made an improper proposal on one occasion to a young school friend of his daughter, while she was visiting at his house. It was further shown by the father of Fay Detrick that after the wife and girl had left defendant's house, defendant went to the home of Fay Detrick's parents and a conversation was there had in the presence of Fay Detrick. The witness in detailing the conversation made the following statement: "'Well,' Fay says, that 'Mr. Bush was to tell you where you could find your wife.' 'Well,' he says, [meaning defendant], 'I seen Mr. Bush and he won't tell me.' 'Well,' Fay says, 'if he won't tell you, I won't tell you.' And he said—now says Fay, he says, 'If you will tell me where my wife is and the little girl is,' he says, 'I will let bygones be bygones.' He says, 'There will never be anything said about this nor nothing doing,' and he says, 'if you do not tell me there will be something done to-morrow.' 'Well,' says Fay, 'I will take my medicine.' Mr. Deatruck says, 'I will take mine,' and he says, he knew Fay, he says, 'you know that I had three witnesses outside watch you that night.' He says, 'I had three witnesses watching you that night, and I know just what you done,' and Fay says, 'I have never done anything worse than you have done.' He says, 'Amy has told me all about it.' So I think that that was just about all that he said to Fay then, only determined to know where he could find his wife—he was going to know that night." A physician who made a physical examination of the young girl after the charge had been preferred against the defendant, testified that he found her in much the condition of a married woman in his examination of her private organs. This, in brief, was the substance of the testimony introduced on behalf of the prosecution. It was shown in defense that the defendant was a man fifty-six years of age. Two physicians, who had made an examination of him, testified that his private organs were in such a state as to indicate to them that the defendant was impotent, and had no ability to perform an act of sexual intercourse. The defendant testified that he was unable to commit the crime charged, and testified that he did not have the intercourse with the girl as alleged; that he had discovered relations of intimacy between Fay Detrick and his wife, and also between Fay Detrick and Amy Deatruck; that upon mak-

ing this discovery he upbraided his wife and made a partial threat to have Fay Detrick arrested; that the wife declared to him that if he did cause the arrest of Fay Detrick, the three of them, to wit, Mrs. Deatrick, Fay Detrick, and Amy Deatrick, would shift the charge to the defendant in order to save Fay Detrick from prosecution. There was testimony given by a number of witnesses, evidently reputable citizens of the neighborhood of Belleflower, to the effect that the defendant's reputation for the trait involved in this charge, and also for honesty and integrity, was good. Under this state of the evidence the case went to the jury and the verdict of guilty was returned. This court on appeal cannot say that the evidence was insufficient to justify the conviction, for there was ample evidence to sustain the verdict of the jury. A number of errors are assigned, many of which go to the matter of the introduction of testimony, and the refusal of the court to allow certain matters to be shown on the part of the defendant.

It is first claimed that the restriction imposed upon counsel for the defendant in their cross-examination of the girl Amy Deatrick, was too close, as to questions asked her designed to extract admissions that there was a conspiracy on the part of Mrs. Deatrick, Fay Detrick, and the witness to send defendant to the penitentiary. While it is true that several of the questions to which objections were sustained were relevant and proper as tending to elicit information as to the bias of the witness, we find in the record that the same matters were in their full substance covered by other questions which were asked, and to which latter questions answers were permitted to be made. We agree altogether with counsel for defendant that in a case of this kind very wide latitude should be allowed the cross-examiner. In a case where the charge is as that made in the information here, and the prosecutrix is a young girl, the sympathies and prejudices of the jury are very easily aroused in her favor, and, as it has been very properly said, the accusation is one which is easily made and hard to disprove. However, while it is the duty of the trial court in such cases to exercise its discretion in the direction of permitting a very liberal, complete, and comprehensive cross-examination to be made of the prosecutrix, the mere fact that that discretion is not resolved as fully as it might have been in the defendant's favor does not justify a reversal of the judgment.



It is, secondly, objected that the court erred in refusing to admit in evidence certain letters and cards which passed through the mails between Fay Detrick and the prosecutrix. These missives were of an intimate and confidential tenor, but we cannot see how their rejection could have worked any prejudice to the defendant's case, inasmuch as it was abundantly shown, and without any dispute whatsoever, that the girl had sustained illicit relations with Fay Detrick. The contents of the letters certainly could not have argued to establish a more intimate relation than this.

Defendant had introduced the testimony of two physicians tending to show that he was deficient in sexual power. He testified on his own behalf, and stated that at the time charged in the information he was unable to accomplish an act of intercourse with any person. The prosecuting attorney in cross-examining him asked as to whether subsequent to the filing of the information, while staying at the house of a friend, he had not gone to the door of a woman's bedroom in the morning and asked permission to come into the room, saying: "I just want to see if I can raise my passions." The admission of this testimony furnishes ground for vigorous objection made on behalf of appellant. It is claimed that the prosecuting attorney went outside the limits of a proper line of cross-examination. We do not think that the cross-examination was improper. The question was designed to show a contradiction of the assertion of the defendant that he was unable to accomplish sexual acts; to show that he had sought an opportunity to at least attempt such an act at a time subsequent to that charged in the information. The gist of the defendant's declarations on the witness-stand was that he was altogether without inclination in the direction mentioned, and the cross-examination was directly in point as being intended to show acts inconsistent with the defendant's declaration. There was no attempt to impeach the witness upon his answering in the negative.

It is contended that the evidence conclusively showed that the defendant was impotent, and utterly incapable of performing the act with which he was charged. That question was one for the jury, not for an appellate court, to resolve. There was direct and positive testimony that the defendant did in fact commit the crime charged. The testimony of the physicians did not wholly negative the possibility of the defendant

being able to accomplish an act of the kind described in the testimony; the jury was not bound either by the opinion of the physicians, or the statement of the defendant himself, as against the testimony of the prosecutrix and all of the circumstances shown in proof. At one point in the cross-examination of the defendant the prosecuting attorney asked him as to whether he would be willing to submit himself for examination to a physician whom the court might select. He answered in substance that he had been examined enough, and did not care to submit himself for the inspection of any more physicians. We have no doubt but that the asking of this question of the defendant on cross-examination and compelling an answer thereto, was error, but we are not prepared to conclude that the damage done was such as to produce in this case a miscarriage of justice. The trial judge was evidently doubtful of the propriety of permitting the question to be answered, for he said at the time: "I will state to the jury that as a matter of law, no defendant is required to testify against himself in any manner, and the submitting of one's self to an examination of this character, would be giving testimony against himself, so that in case he should decline to be examined, you must not in any regard consider that as testimony against him or draw any inference of any character against the defendant if he should so decline." In view of this direction to the jury, and in view of all of the testimony in the case, tending to show that the crime was committed as charged in the information, it would not be declaring a reasonable conclusion to say that the disinclination of the defendant to submit himself to further examination by physicians, as expressed in his answer to the question, may have turned the scales in the jury's mind in favor of the prosecution and prompted the verdict of guilty.

In the brief of counsel for appellant it is complained in a general way that certain offered instructions should have been given, certain of those given should have been refused, and modifications of others should not have been made. The argument addressed to these points is general, and does not point out specifically wherein error was committed. While it is the duty of counsel to not only specifically point to the instruction the giving, refusing, or modification of which they claim to be error, but to particularize as to the reasons supporting their contention, we have nevertheless made a careful exam-

ination of the whole charge as given by the court, and think that it included and properly stated all the matters of law upon which the jury needed to be advised. We agree with counsel for appellant that the sentence imposed in this case, that of twenty-five years' imprisonment, to a man now fifty-seven years old, means a life sentence. But, however much we might differ with the trial judge as to the propriety of such a judgment, that is a matter which rests alone with the conscience and discretion of the judge who heard the witnesses, and it is not a part of the functions of an appellate tribunal to enter upon any consideration of that question.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 20, 1916.

---

[Civ. No. 1985. Second Appellate District.—May 22, 1916.]

**CARL RODEMEYER, Appellant, v. G. MEGER, Respondent.**

**EASEMENT—DIVISION OF LAND INTO PARTS—GRANT OF ONE PART—RIGHT TO EASEMENT IN REMAINING PART.**—Where an owner of land divides it into two parts and makes a grant of one of such parts, such grant, by implication, includes all such easements in the remaining part as are necessary for the reasonable enjoyment of the part granted in the form in which it was used at the time of the transfer.

**ID.—RIGHT OF USER OF IRRIGATING DITCH OVER RESERVED LAND—CHARACTER OF USER AT TIME OF GRANT—FAILURE TO FIND ON MATERIAL ISSUE.**—Where in an action to enjoin interference with the user by the plaintiff of an irrigating ditch extending over the land of the defendant, through and by means of which plaintiff claimed the right to conduct a flow of water for irrigating his land, which land was purchased by him from the defendant, it is alleged in the answer that the ditch at the time of the conveyance of the land to the plaintiff was but of a temporary character, it is essential to support a judgment in favor of the plaintiff that the court should have found whether such ditch was of a temporary or of a permanent character at the time of such conveyance.

**APPEAL** from a judgment of the Superior Court of Orange County, and from an order denying a new trial. Charles Wellborn, Judge presiding.

The facts are stated in the opinion of the court.

F. C. Spencer, for Appellant.

Tipton & Cailor, for Respondent.

**SHAW, J.**—This is an appeal from a judgment in favor of defendant; the action being one wherein plaintiff sought to have defendant enjoined from interfering with an irrigating ditch extending over the latter's land, through and by means of which plaintiff claimed the right to conduct a flow of water for irrigating his land.

As alleged in the complaint, defendant was the owner of a twenty-acre tract of land which, on January 31, 1912, he conveyed to plaintiff, together "with the tenements, hereditaments, easements and appurtenances thereunto belonging or appertaining"; defendant reserving therefrom, however, three-fourths of an acre out of the northeast corner of said tract. (We will designate the nineteen and one-fourth acres of land conveyed to plaintiff as "Tract 1," and the three-fourths of an acre reserved by defendant as "Tract 2.") At the time of conveying tract 1 to plaintiff, and for some two years prior thereto, there existed an open ditch or conduit extending along the entire east side of the twenty-acre tract, through and by means of which water was conducted for irrigating the same, of which fact plaintiff at the time of his purchase had knowledge. After purchasing tract 1 plaintiff, without objection from defendant, and up to June, 1913, used that part of the ditch extending over and along the east side of tract 2, so reserved by defendant, as a means for conducting a supply of water to tract 1 for irrigating the same and the growing crops thereon, as defendant had done when owner thereof. No other means exist whereby plaintiff can obtain a supply of water, and irreparable injury will follow his failure to obtain such supply. In June, 1913, defendant obstructed the flow of water in the ditch extending across tract 2 and connecting with plaintiff's ditch and land, and refused to allow plaintiff to convey water through the same.



In his answer defendant denied that he conveyed to plaintiff any easement or right to convey water across tract 2 so reserved by him or to use the ditch thereon, and, on the contrary, alleged that plaintiff agreed that defendant should retain in himself the exclusive right to and use of the ditch on tract 2, together with the right as well to run water through the ditch over tract 1 sold to plaintiff. He also alleged that the conduit in question now existing along the east side of tract 2 "is not the same ditch used by defendant in irrigating the said twenty acres of land prior to the time of the sale of the property herein to plaintiff," but that prior to the sale of said land to plaintiff there had been no permanent ditch of any kind upon said tract, and that the ditch now located along the east side of tract 2 was, and is, and has been, a temporary ditch, and that the same has been plowed in and filled up many times by this defendant with the knowledge of the plaintiff.

Section 1104 of the Civil Code provides: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." And section 1084 of the Civil Code provides that "the transfer of a thing transfers also all its incidents, unless expressly excepted."

The law seems to be well settled that where an owner of property divides it into two parts and grants one of such parts, such grant, by implication, includes all such easements in the remaining part as are necessary for the reasonable enjoyment of the part granted in the form in which it was used at time of the transfer. (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, [17 Pac. 69].)

Respondent, however, as stated, alleged in his answer that by the terms of the grant to plaintiff he retained in himself the exclusive right to use all that part of the ditch extending over and across the three-quarter acre tract designated as tract 2, and also alleged that the ditch in question was not obviously and permanently used, but merely temporarily used. The determination of the question involved depends upon the answer to the issues thus tendered. If, as alleged by plain-

tiff, defendant conveyed the land to him, together with the easements appurtenant thereto, and this conduit extending over and across the tract reserved by defendant was, and had been for more than two years, obviously and permanently used by defendant when owner of the entire tract of land as the only means of conveying water thereto for irrigating crops growing thereon, then plaintiff, under the authority cited, was entitled to the use of the ditch in the same manner and to the same extent as defendant had used it before selling the land. The court, however, failed to make any finding upon either of these issues; and for this reason the judgment must be reversed. The conclusion of law as found by the court, that plaintiff was not entitled to run water over the three-quarter-acre tract, cannot aid respondent on appeal for the reason there is no finding of fact upon which to base such conclusion; nor does the finding that "said water was run from other pumping plants in the neighborhood through ditches more or less indefinitely, irregularly and temporarily constructed on both tracts," aid in a determination of the case. The question is whether or not plaintiff was and is entitled to conduct water over tract 2 owned by defendant, and, as stated, that depends upon material issues as to which the court has made no answer in the findings.

The judgment and order appealed from are reversed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1457. Second Appellate District.—May 22, 1916.]

**MARCELLE KOCH**, Respondent, v. **L. O. WILCOXON** et al., Defendants; **JOHN DOHERTY**, Appellant.

**QUIETING TITLE—PLEADING—AMENDED COMPLAINT—ALLEGATION OF FRAUD—CAUSE OF ACTION NOT CHANGED.**—Where the original complaint in an action to quiet title sets forth the cause of action in the form customarily used in such actions, an amended complaint which in addition to such allegations sets out acts amounting to fraud on the part of the defendant in procuring a deed from the plaintiff to the property in dispute, does not state a different cause of action.



**ID.—AMENDMENTS OF PLEADINGS.**—An amendment to a pleading may always be made to conform to the proof, provided the cause of action is not thereby changed.

**ID.—DEED—CONVEYANCE TO AGENT FOR SPECIFIC PURPOSE—BREACH OF TRUST—RELIEF—LACK OF CONSIDERATION.**—A grantor of real property who makes a conveyance thereof to an agent for the purpose of enabling such agent to complete a represented sale of the property for the former, is entitled, upon a breach of the trust by the agent, to relief in equity upon the ground of failure of consideration.

**ID.—PURCHASE OF PROPERTY AT EXECUTION SALE—NOTICE OF *LAS PENDENS* IN QUIET TITLE ACTION—STATUS OF PURCHASER.**—An execution creditor of the grantee under such a deed who purchases the property at the execution sale is not an innocent purchaser thereof for value, as against the real owner, where he has constructive notice of a *lis pendens* filed by the real owner in an action to quiet title to such property as against the grantee.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

I. Henry Harris, and Charles A. Bank, for Appellant.

Ingall W. Bull, and Walter E. Burke, for Respondent.

**JAMES, J.**—Appeal from a judgment in favor of plaintiff, and from an order denying to defendant Doherty a new trial.

Plaintiff brought this action to quiet title to a certain lot of land in the county of Los Angeles. The main facts, as found by the trial judge and shown by the evidence in the bill of exceptions, are in brief as follows: Marcelle Koch, being the owner of the lot in question, while in the city of San Diego was interviewed by defendant Wilcoxon, who claimed to have a purchaser for the lot in Los Angeles County. Wilcoxon stated that his purchaser would pay the sum of six thousand five hundred dollars in cash for the lot. He further stated that he did not have the name of the purchaser, but that if plaintiff would make out a deed leaving the name of the grantee blank, he, Wilcoxon, would take the deed to Los Angeles, meet the purchaser, deliver the deed after inserting the name of such purchaser, and remit the

amount of the purchase price forthwith to the plaintiff. The deed was made out accordingly on about the twenty-second day of February, 1912, in San Diego. The name of the grantee was first left in blank, but after plaintiff had acknowledged the deed in that form the notary made some suggestion as to the possible invalidity of such an instrument; so thereupon it was agreed that Wilcoxon's name should be inserted in order to enable the latter to complete the transaction of the sale according to his agreement. Wilcoxon took the deed and returned to the city of Los Angeles. The plaintiff received no money and some months later, upon coming to the city of Los Angeles, found that Wilcoxon had not only occupied the house, which was upon the lot, with his family, but had also rented the same to a tenant from whom he collected one hundred dollars per month. Wilcoxon, when the return of the deed was demanded, first stated that he had mailed it to the plaintiff at San Diego, and later declared that the deed had been lost. On an examination of the records being made, the plaintiff discovered that the deed had been placed of record, which apparently transferred title to Wilcoxon. Prior to the making and recording of this deed to Wilcoxon, the defendant Doherty was a judgment creditor of Wilcoxon in the sum of \$4,653. The judgment was obtained in a neighboring county, and an abstract thereof had been recorded in the offices of the county clerk and county recorder of Los Angeles County. Doherty, being unable to secure satisfaction of his judgment, afterward made some agreement of compromise with Wilcoxon whereby Doherty was to receive two thousand dollars in full payment of the judgment; five hundred dollars to be paid in cash, the balance in deferred payments. Wilcoxon did not fulfill his part of this contract requiring the payments on the judgment account. In the meantime, Doherty, the judgment creditor, had discovered that title to the lot hereinbefore referred to stood in the name of Wilcoxon on the public records, and proceeded to have execution issued and levied upon the lot in order to subject the same to sale and satisfaction of his judgment. After this execution was issued and the levy made, the plaintiff here brought this suit to quiet title to her lot, the complaint being in the form customarily used in such actions. A *lis pendens* was filed in the county recorder's office giving notice of the plaintiff's suit, but, notwithstanding this

notice, which constructively advised the public and defendant Doherty of the claim made by the plaintiff that she was the owner of the lot, Doherty proceeded with the execution sale against the lot, and on the fifth day of September, 1912, the sale was held, Doherty bidding in the property for the sum of two thousand dollars. Thereafter this action came to trial and after the evidence had been introduced, which disclosed the facts to be as briefly set out in the foregoing, the court allowed the plaintiff to amend to conform to the proofs, and the complaint was thereupon amended accordingly. In this amended complaint the facts touching the making of the deed and its delivery to Wilcoxon were all set out. The prayer attached to the amended complaint was not only for a decree determining the title to the lot to be in the plaintiff as against the defendants, but further, that Wilcoxon be required to reconvey to the plaintiff. Incidentally it may be here remarked that some point is made that by the prayer of the amended complaint plaintiff asked for relief to which she was not entitled under the first complaint filed, to wit, as to the prayer for a reconveyance. The prayer of the first complaint, in addition to asking that the title of plaintiff be quieted and defendants be adjudged to have no right, title, or interest in the premises, demanded other and further relief such as might be equitable. The appellant Doherty is not in a position to complain of the judgment upon the amended complaint requiring the reconveyance to be made by Wilcoxon. Wilcoxon is not appealing, and he suffered judgment to go against him without contest. It is insisted that the court had not the right to permit the plaintiff to amend to the extent of setting out acts amounting to fraud on the part of Wilcoxon, because to do so would be to change the cause of action first declared upon by the plaintiff. Amendments under our practice are liberally allowed, and in the main that matter rests within the discretion of the trial court. Such amendments may be made to a complaint either during the trial or after the evidence is all in. (*Lee v. Murphy*, 119 Cal. 365, [51 Pac. 549, 955]; *Brown v. Hurst*, 1 Cal. App. 752, [82 Pac. 1056].) An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed. (*Hancock v. Board of Education*, 140 Cal. 554, [74 Pac. 44].) The amendment in this case did not change the cause of action. In effect it merely set out in de-

tail the facts showing how the apparent title to the lot happened to stand in Wilcoxon's name and that no consideration had been rendered by Wilcoxon for the deed. The case of *Henry v. Phillips*, 163 Cal. 135, [Ann. Cas. 1914A, 39, 124 Pac. 837], is direct authority for permitting such an amendment to be made in an action to quiet title.

Appellant further contends that having voluntarily inserted the name of Wilcoxon in the deed and delivered it to him, plaintiff could not thereafter assert that the conveyance was other than what it purported to be, to wit, a *bona fide* transaction for value. This statement is too far-reaching in its suggestion of the legal situation which arises upon such assumed facts. Very often property standing in the name of one person is determined to be held in trust for another, and such a conveyance is always open to proof as to where the real ownership resides unless innocent third persons have parted with value in reliance upon the integrity of the apparent title of the record holder. Section 1056 of the Civil Code, which declares that a grant cannot be delivered to the grantee conditionally, has no application. In *Kimball v. Tripp*, 136 Cal. 631, [69 Pac. 428], we find this expression: "The position of the appellant on this point is, that as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But, assuming the absence of fraud (though, in view of the defendant's relation to the grantor as her agent, this can hardly be assumed), it does not follow that equity cannot afford relief. The deeds, it is found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him. . . . 'Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the party entitled in equity to its beneficial enjoyment,' which is the same principle that, at law, governs the action for money had and received. This principle has not always been consistently applied by the courts; but in this state it has been held applicable to cases

where there were fiduciary relations between the parties, as in this case. . . . There is also another principle upon which the rule may be sustained, which is, that in such cases generally, and in this case especially, there is an entire failure of consideration." In this case, not only was the fraud of the agent shown, but there was an utter failure of consideration under the facts disclosed by the evidence and afterward detailed in the amended complaint. We think that both the original complaint and the complaint as amended stated a good cause of action.

Appellant insists that as a purchaser at the execution sale he was an innocent party, and was entitled to rely upon the record title as it was shown to be in Wilcoxon. The question as to whether a judgment creditor who bids at his own execution sale is an innocent purchaser within the rule adverted to, is not settled by unanimous decision of the courts. Our supreme court, however, has given countenance to the proposition that such a creditor-purchaser is entitled to the same favor under the law as would be extended to a third party who might purchase at such a sale. (*Riley v. Martinelli*, 97 Cal. 575, [33 Am. St. Rep. 209, 21 L. R. A. 33, 32 Pac. 579].) But a purchaser at an execution sale, in order to maintain his title as against the claim of a third person, must have purchased without any notice that the title was other than the record showed it to be. In *Riley v. Martinelli*, section 336 from Freeman on Executions is quoted as follows: "The purchaser at an execution sale takes his title subject to such liens, easements, and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith, and without any notice, actual or constructive, of the existence of such lien, easement, or equity." Notice which will charge the purchaser necessarily is any legal notice which he may have received of the defect in the title prior to the occurrence of the sale and the payment of his money. (*Murphy v. Clayton*, 113 Cal. 153, [45 Pac. 267]; *Scott v. Umbarger*, 41 Cal. 410, 419.) The notice of *lis pendens* filed prior to the making of the sale on execution gave notice to all intended purchasers that the plaintiff herein claimed to be the owner of the lot which it was proposed to have sold on execution process. (Code Civ. Proc., sec. 409.)



For the reasons given, we are convinced that the defendant Doherty obtained no title or interest in the lot by reason of his purchase at the execution sale, and that the judgment of the court quieting title against him is right.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1468. Second Appellate District.—May 23, 1916.]

HERBERT KENNETH PRIESTLEY, an Infant, by H. I. Priestley, His Guardian ad Litem, Respondent, v. A. M. STAFFORD, Appellant.

**PHYSICIAN AND SURGEON—TREATMENT OF PATIENT—DEGREE OF LEARNING AND SKILL REQUIRED.**—There is no implied contract on the part of a physician who undertakes the treatment of one suffering from disease or injury, that such treatment will prove a success, or that ill and serious results may not follow as the direct result of such treatment, but he nevertheless, by implication, guarantees that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will, in the treatment of his patient, exercise reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and where he possesses such degree of learning, and in applying it exercises ordinary care and skill, he is not liable for the results that follow.

**ID.—NEGLECTENCE OF PHYSICIAN—TREATMENT OF FRACTURED ARM.**—A physician who in the treatment of a fractured arm adjusted the splints and bandages in a manner so tight that no space was left for the enlargement of the arm due to the swelling that ordinarily follows in such cases, and who, upon being informed of such swelling, and of the great pain which the patient was suffering therefrom within a few hours after the treatment, neglected to visit the patient until the following day, and then took no steps to loosen the splints or relieve the pain except to suggest the administration of a dose of paregoric, is guilty of negligence in failing to exercise that degree of skill and care ordinarily exercised by the members of his profession.

**APPEAL** from a judgment of the Superior Court of Riverside County, and from an order denying a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

G. R. Freeman, for Appellant.

McFarland & Irving, for Respondent.

SHAW, J.—Action to recover damages alleged to have been sustained as the result of negligent surgical treatment administered by defendant.

Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

It appears that on May 2, 1911, the plaintiff Herbert Kenneth Priestley, a minor, suffered a fracture of the radius and ulna of his right arm; that defendant, a physician and surgeon, was for compensation employed by plaintiff's father to set, care for, and treat the fractured arm of said minor. The court found:

"That pursuant to said undertaking said defendant within one hour after the injury had occurred, examined the said broken arm of plaintiff, reduced the fracture, and applied anterior and posterior wooden splints to said arm and bandaged said splints with a roller bandage; that in the bandaging of said arm as hereinabove described, the said defendant did not make sufficient allowance for the swelling invariably attendant upon fractured limbs; that within two hours after said splints were applied said arm was subjected to undue pressure by said splints by reason of said swelling; that said defendant negligently, carelessly, and without proper or usual care, permitted said splints to remain upon said arm, without adjustment for a period of thirty-eight hours, although said defendant was notified within three hours after said splints were applied that said minor was suffering extreme physical pain by reason of said pressure; that as a result of said pressure, the circulation of blood through said arm was impaired, resulting in necrosis of the skin and ulceration of the skin, flesh and tendons on both sides of said arm immediately beneath the entire length of the splints; that by reason of said negligence and careless and unskillful manner of bandaging said splints upon said arm and permitting them to remain thereon without readjustment for a period of thirty-eight hours, and the necrosis and ulceration caused thereby, the muscles and tendons of said arm have contracted, and said

arm has become permanently deformed, and the right hand of said minor is now useless, and said minor will not in the future recover the normal use of said hand.

"That said defendant, in the treatment of said arm of said minor, did not exercise that degree of skill and care ordinarily exercised by the members of his profession, practicing in the said city of Corona, and similar localities."

The only ground urged for a reversal is appellant's contention that these findings are not supported by the evidence. That the child's hand and arm were badly crippled and deformed is conclusively shown, and the evidence is ample to prove that such condition was due to the manner in which the splints and bandages were applied by defendant in dressing the arm after reducing the fracture, and the fact that as applied they were continued without change for some thirty-eight hours.

While in actions of this character the injury, and the fact that it resulted from the professional treatment administered must be established, such finding standing alone will not justify a recovery of damages by a plaintiff. On the part of a physician who undertakes the treatment of one suffering from disease or injury, there is no implied contract that such treatment will prove a success, or that ill and serious results may not follow as the direct result of such treatment. While "not a warrantor of cures" (*Ewing v. Goode*, 76 Fed. 442), he nevertheless by implication guarantees that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will in the treatment of his patient exercise reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed. (*Houghton v. Dickson*, 29 Cal. App. 321, [155 Pac. 128]; *Bonnet v. Foot*, 47 Colo. 282, [107 Pac. 252].) And where he possesses such degree of learning and in applying it exercises ordinary care and skill, he is not liable for results that follow. (*Wurdemann v. Barnes*, 92 Wis. 206, [66 N. W. 111]; *James v. Crockett*, 34 N. B. 540.)

Since the contrary is not made to appear, it must be conceded that defendant possessed the requisite professional skill and learning. The court, however, as stated, found: "That said defendant, in the treatment of said arm of said minor, did not exercise that degree of skill and care ordinarily exercised by the members of his profession. . . ." There is no

conflict of evidence as to the fact that the fracture was properly reduced; nor as to the manner in which the splints and bandages were adjusted, and the length of time they were continued as originally applied without change. The evidence, however, strongly tends to prove that defendant, for the purpose of retaining the fractured bones in place, adjusted splints and bandages to the injured arm in a manner so tight that no space was left for the enlargement of the arm due to the swelling that ordinarily follows in such cases, by reason of which, great and undue pressure was applied to the tissues, causing intense pain and complaint by the child that the splints were too tight, of which fact defendant, within an hour or so after leaving the patient, was informed by the boy's father, who suggested that the splints were too tight, notwithstanding which he neglected to visit the boy until the next morning, some ten or twelve hours thereafter, and took no steps to ascertain whether or not the splints should be removed in order to reduce the pressure and relieve the child from the pain due to such undue pressure, other than advising the boy's father to administer a dose of paregoric. "Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done." (*McGraw v. Kerr*, 23 Colo. App. 163, [128 Pac. 870, 873].) And since it must be conceded upon the evidence that the condition of the boy's hand and arm was due to undue pressure caused by the fact that the splints were adjusted in a manner which did not allow for the usual swelling accompanying such cases, the question as to whether such omission constituted negligence was one for expert testimony. When defendant was informed that the child was suffering intense pain, and asked if he did not think the splints were too tight, he stated that if the splints were removed he would prefer to do it himself, and said he did not think it would be necessary to do that, as he wanted the splints tight. Dr. Stafford did not make any other suggestion, nor advise that he be called again; nor did he visit the patient until the following morning, at which time the child's fingers were curled over the end of the splints, swollen and discolored, indicating, according to expert witnesses called, that the splints were too tight, as a result of which great pressure was exerted upon the tissues of the arm. No change, however, was made in the splints or bandages. Among other physicians called to testify

as to the treatment administered by defendant, was Dr. Martin, who testified as follows: "From my understanding of the practice of medicine and surgery in this vicinity, and at Corona, I consider that a physician upon being notified of extreme pain existing in a child whose arm had been fractured, and that the child complained that the splints as applied were too tight, should in the exercise of ordinary prudence, have either called upon the child and determined the cause of the pain, or have ordered the splints loosened. I do not recall any other cause which would cause extreme pain in a fractured limb within one hour after the splints had been applied other than tight splints. . . . The injury to the muscles would be produced by the tightness with which the splints were applied." And Dr. Griffith testified that, upon being informed within an hour or two of the fact that the child was suffering extreme pain, "my own practice is to loosen the splints, or, if I cannot get to the patient, to tell them to loosen them themselves"; and further, that the pain suffered by the child indicated that the splints were too tight. He further testified that the swollen and discolored condition of the fingers, as found the next morning, indicated that the splints as applied by Dr. Stafford upon the arm of the child were too tightly applied. There was other testimony of physicians, all of which clearly tended to prove that defendant was not only negligent by reason of the fact that he applied the splints and bandages in a manner which made no allowance for the swelling of the arm accompanying such fractures, but that he was likewise negligent when, upon being informed within an hour after leaving the child that he was suffering excruciating pain and complaining that the splints were too tight, in not removing the splints himself or having them removed; and likewise negligent, when he visited the child the following morning and discovered the condition of the hand and arm, in not removing the splints in order to relieve the undue pressure which was then apparent. These facts, as well as others which the evidence clearly tended to establish, fully support the finding of the court that defendant in treating the fractured arm of plaintiff, did not exercise that degree of skill and care ordinarily exercised by the members of his profession practicing in Corona and similar localities.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.



[Civ. No. 1529. Third Appellate District.—May 23, 1916.]

**EAST SIDE CANAL AND IRRIGATION COMPANY.**  
 Petitioner, v. **SUPERIOR COURT OF THE COUNTY**  
**OF MERCED et al., Respondents.**

**COSTS—ORDER DENYING MOTION TO TAX—INSUFFICIENT NOTICE OF ORDER—SETTLEMENT OF BILL OF EXCEPTIONS ON APPEAL—MANDAMUS.**

Where a motion to tax costs is made, a hearing had thereon and the matter submitted to the court for its decision, and an order is thereafter made denying the motion, the moving party is entitled to written notice of such decision, and a letter mailed by counsel of the successful party to counsel for the opposing party after the decision of the motion which makes no reference to the decision, but merely demands payment of the amount of such costs, is not a sufficient notice of such decision, and the trial court is not justified in refusing to settle the bill of exceptions proposed to be used upon appeal from the order denying the motion upon the ground that the bill was not presented within the statutory time after receipt of such letter, and *mandamus* will lie to compel such settlement.

**APPLICATION** for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District to compel the settlement of a bill of exceptions to be used on an appeal from an order denying a motion to tax costs.

The facts are stated in the opinion of the court.

James F. Peck, and L. Sidenberg, for Petitioner.

Edward F. Treadwell, for Respondents.

**CHIPMAN, P. J.**—Application for writ of mandate to compel the settlement of a bill of exceptions by the judge of the superior court of Merced County, said bill of exceptions to be used on an appeal from an order of said court denying the motion of petitioner to tax the costs on appeal in the action entitled *Thomas C. Turner, as Administrator, etc., et al., Plaintiffs, v. East Side Canal & Irrigation Company, Defendant.*

It appears from the petition that in the trial of said action judgment passed for defendant and plaintiffs appealed. The

judgment was reversed by the supreme court and *remittitur* was filed with the clerk of said superior court on July 31, 1914. It is alleged in the petition that appellant in said appeal served upon petitioner a memorandum of costs on October (?) 24, 1914, "and filed the same with the clerk of said court on the 26th day of August, 1914," a copy of which said memorandum is made part of the petition as Exhibit "A"; that, on August 27, 1914, petitioner served upon plaintiffs in said action and, on August 28, 1914, filed with the said court a motion and notice of motion to tax costs on said appeal, a copy of which is made part of the petition attached to Exhibit "A," and also filed therewith the affidavit of James F. Peck (petitioner's attorney); that said motion came on to be heard on January 26, 1915, at which time the affidavit of Edward F. Treadwell (attorney for respondents) was filed, both said affidavits being made part of said petition; that, on April 5, 1915, the said court made an order denying said motion to tax costs, also made part of the petitioner's Exhibit "A"; that no notice of said order was served on petitioner or its attorney, and petitioner and its attorney had no knowledge of the making of said order until July 12, 1915; that, on July 17, 1915, petitioner (defendant in said action) served upon plaintiffs therein a bill of exceptions which is made part of the petition as Exhibit "A," "and no amendments were proposed to said bill of exceptions and the same was returned to and received by the clerk of the court for settlement on the 29th day of July, 1915"; said bill of exceptions bears the indorsement of service upon plaintiffs' attorneys, July 17, 1915; that said bill of exceptions came on to be heard September 1, 1915; that affidavits of said Treadwell and said Peck were read to the court and were made part of the petition; that thereupon plaintiffs' attorney objected to any settlement of said bill of exceptions and the matter was submitted to the court to settle the said bill if said objections were overruled; that, on January 31, 1916, "the court refused and denied and ever since has refused and denied the right of petitioner herein to have said bill of exceptions settled"; that no notice was ever served by plaintiffs on defendant of the said order of said court of April 5, 1915, denying said motion to tax costs.

Mr. Treadwell made affidavit that no bill of exceptions to said order of April 5, 1915, was ever served on counsel for

plaintiffs until July 17, 1915; that, after the making of said order and on May 26, 1915, affiant inclosed in an envelope postage prepaid and directed to Mr. James F. Peck, Crocker building, San Francisco, and deposited the same in the post-office of said city, the following notice:

"May 26, 1915.

"Mr. James F. Peck, Crocker Building, San Francisco, Cal.

"Dear Sir: The costs on plaintiff's appeal, as taxed by the court, in the case of Turner vs. East Side Canal & Irrigation Company amount to nine hundred and sixty-three dollars and ten cents (\$963.10). Will you kindly have your client send a check for the same at once.

"Yours truly,

"EDWARD F. TREADWELL."

Mr. Peck made affidavit that, on May 27, 1915, "he had a conversation by telephone with P. J. Thornton, the county clerk of Merced County and *ex-officio* clerk of the superior court of Merced County. That in said conversation the affiant inquired of said clerk as to whether or not the said court made any decision or determination of the motion, theretofore submitted to said court, to tax costs of the plaintiff on appeal in the above-entitled case; that the said clerk then informed affiant that no decision or order had been made by said court on said motion or the subject thereof, whereupon affiant requested the clerk to carefully examine the records for the purpose of ascertaining the facts, and the clerk said he would do so, and the clerk thereafter on said day stated over the telephone that no order or decision had been made by said court on said motion to tax costs." It is then stated that, within ten days before service of said proposed bill of exceptions (which was on July 15, 1915), affiant was informed by letter written by said clerk informing affiant of the fact of the court's order and decision "on said motion to tax costs," and reciting the fact of the mistake of said clerk. "And affiant never had any knowledge of any order or decision upon said motion, and at all times herein mentioned, the said Edward F. Treadwell, attorney for plaintiffs, had his law office in the city and county of San Francisco."

It thus appears that the cost bill was duly served and filed, objections thereto made on motion to tax costs, a hearing

had thereon and the matter submitted to the court for decision. Thereafter, to wit, on April 5, 1915, the court made its order denying said motion to tax costs. On May 26, 1915, Mr. Treadwell, attorney for plaintiffs in said action, mailed to Mr. Peck, defendants' attorney therein, the letter above set forth. The next day, May 27, 1915, Mr. Peck called up the clerk of the court to ascertain whether the court had made any order in the matter of the cost bill, as we have above set forth, and was informed that no order had been made. Nothing further occurred in the matter until "within ten days before service of said proposed bill of exceptions" (which was on July 15, 1915), when Mr. Peck was informed by letter written by said clerk that the latter had made a mistake and informing Mr. Peck of the fact of the court's order and decision "on said motion to tax costs." Upon this state of facts the bill of exceptions was presented to the court for settlement and denied, and the writ of mandate is sought to compel the court to settle said bill of exceptions.

In explanation of its action the court said: "In order that you may know my reasons for ruling in the matter of the settlement of a bill of exceptions in the case of *Turner v. East Side Canal Co. etc.*, I will simply state that I acted upon the authority of the case of *Heinlen v. Heilbron*, 94 Cal. 636, [30 Pac. 8]. The affidavit states positively that the office of defendants' attorney was at the place to which the notice was directed—Crocker building, etc. This constitutes personal service where its receipt is not denied and every opportunity given to make denial."

We think there can be no doubt of the receipt of Mr. Treadwell's letter by Mr. Peck. It was deposited in the postoffice at San Francisco on May 26, 1915, directed to Mr. Peck in the building where he had his office, the postage prepaid, and on the next day Mr. Peck called up the clerk to learn whether an order had been made on the motion to tax costs. In his affidavit he does not deny its receipt.

The question then is—Was the letter of Mr. Treadwell sufficient to impart legal notice to Mr. Peck that the court had made the order of April 5, 1915?

Section 649 of the Code of Civil Procedure provides as follows: "A bill containing the exception to any decision may be presented to the court or judge, for settlement at any time after the decision is made, but the same must be pre-

sented within ten days after written notice of making such decision," etc. Section 1012 of the same code provides that "Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail," and section 1015 of the Code of Civil Procedure provides that ". . . in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except," etc.

"Service by mail is good only where the person making the service and the person on whom it is made reside in different places, between which there is regular mail communication." (*Linforth v. White*, 129 Cal. 188, 191, [61 Pac. 910]; *Thompson v. Brannan*, 76 Cal. 618, [18 Pac. 783]; *Pacific Mut. Life Ins. Co. v. Shepardson*, 76 Cal. 376, [18 Pac. 398].)

Section 1011 of the Code of Civil Procedure, however, provides that "The service may be personal, by delivery to the party or attorney on whom service is required to be made . . .," and points out how the service is to be made if upon an attorney and also if upon a party. It was said, in *Heinlen v. Heilbron*, 94 Cal. 636, 640, [30 Pac. 8]: "The 'delivery' which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, and through any agency by which a 'delivery' can be made, and when the notice is so delivered, the service becomes a personal service." In this case the notice was a notice of appeal, which was attempted to be served through the mail, and there was controversy as to whether the package was directed to the place of residence of respondent's attorney, a question the court seems not to have regarded as important. It appeared from the affidavit of respondent's attorney that he received a copy of the notice of appeal at his office and residence in San Jose, through the agency of the postoffice and this, said the court "is equivalent to an admission of service indorsed by him upon the original notice, and establishes that there had been a personal service upon him of such notice, and that the court has thereby obtained jurisdiction of the appeal." It was said further that "jurisdiction, however, as has frequently been held, does not depend

upon the proof of service, but upon the fact that service has been made." (Citing *In re Newman's Estate*, 75 Cal. 213, 220, [7 Am. St. Rep. 146, 16 Pac. 887]; *Sichler v. Look*, 93 Cal. 600, [29 Pac. 220].) In *Shearman v. Jorgensen*, 106 Cal. 483, [39 Pac. 863], it was held that the receipt of a notice served by mail "amounts to a personal service." We think it must be held that Mr. Treadwell's letter was delivered to Mr. Peck, but there still remains the important question whether the letter constituted such notice of the order of April 5, 1915, as is contemplated by the statute.

Petitioner's view of the matter is thus expressed: "We claim that had the letter been actually personally delivered it would not have answered the statute as to notice because of its form. The letter was a demand for payment, and inferentially referred to an order. It did not expressly state that an order, denying the motion to tax costs, had been made by the court, nor did it give any date as to when the costs were taxed. It was not addressed to any person in a representative capacity, as attorney, nor was the same signed by any person as attorney. In itself it did not, nor was it intended to, convey notice. That was not its purpose. It was not entitled in any case or any court, nor was it filed among the records of the case. In passing upon the legal value of this dunning letter as a purported notice, the function of a notice in such a case must be considered. It is not primarily to inform a party of the fact that a certain order was made, but to notify him that his time, within which to perform a certain act, has begun to run, and it should show clearly and explicitly on its face that its purpose was to start the tolling. The statute providing for written notices, as in this case provided, is the equivalent of a stipulation that the party to be charged with the performance of an act may perform such act any time prior to and within ten days after service of the statutory formal notice."

We think there is much force in the views thus expressed. It was said, in *Mallory v. See*, 129 Cal. 356, 359, [61 Pac. 1123], speaking of section 659 of the Code of Civil Procedure: "Written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case

unless it appears, from facts thus evidenced, that written notice was waived." (*Hughes Mfg. etc. Co. v. Elliott*, 167 Cal. 494, [140 Pac. 17].) In *Byrne v. Hudson*, 127 Cal. 254, 257, [59 Pac. 597], the judgment provided that the plaintiff should pay the money within twenty days "after written notice" of the entry of the judgment. The court said: "We think, therefore, that as appellant's right in the premises depended upon the commencement of the running of a certain period of time mentioned in the judgment, and as her title was to be forfeited unless a certain act was done within that period of time, she was entitled to a notice expressly intended for the purpose of starting the period of time mentioned in the judgment, and that a mere incidental recital in a notice of a motion for a new trial, given for an entirely different purpose, was not a sufficient compliance with the terms of the judgment." The statute is no less imperative than a judgment using like terms, and if we substitute the statute for the judgment the rule above stated meets this case. It certainly is open to doubt whether Mr. Treadwell intended his letter to be understood by Mr. Peck as the statutory notice that on a certain day the court made a certain order in a certain case. The writer seems rather to have assumed knowledge of the fact by Mr. Peck, and on that assumption called upon him for payment. If there is doubt as to the intention of the writer, or as to the legal effect of his language, it should be resolved against him. That Mr. Peck was not satisfied as to the meaning of the letter is shown by his calling up the clerk of the court for confirmation on this doubtful matter, and he was informed by the clerk that no such order had been made. We think he was justified in waiting until he had explicit notice, such as the statute requires, before presenting his bill of exceptions. The cost bill amounted to \$963.10. It may be invulnerable, but we think it much better that the objections to it be given a hearing on the merits than to sanction a practice which, in our opinion, would be an infraction of the spirit and letter of the statute.

It appears from the petition that defendant in the action, petitioner here, has duly perfected its appeal to this court from said order, and said bill of exceptions was presented as part of the record on said appeal. The order of April 5, 1915, is not an appealable order.

We think petitioner is entitled to the peremptory writ commanding respondent, the judge of the superior court of Merced County, to settle said bill of exceptions, and it is so ordered.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 22, 1916.

---

[Civ. No. 1477. Third Appellate District.—May 23, 1916.]

KATHERINE S. CROWLEY, Respondent, v. SAVINGS UNION BANK AND TRUST COMPANY et al., Appellants.

**HUSBAND AND WIFE—LOAN OF JOINTLY OWNED MONEYS TO THIRD PARTIES—OWNERSHIP OF NOTES AND MORTGAGES—TENANCY IN COMMON.**—Where moneys on deposit in a savings bank under a contract declaring them to be the joint property of a husband and wife are withdrawn by the husband by consent of the wife and loaned to third parties, who gave their notes and mortgages therefor payable to both husband and wife, the wife's interest in such notes and mortgages is that of a tenant in common.

**ID.—CONVEYANCE TO MARRIED WOMAN—EVIDENCE—CODE PRESUMPTION.** While it is true that the presumption established by section 164 of the Civil Code, that whenever a conveyance is made to a married woman and her husband, she takes the part conveyed to her as tenant in common, is not conclusive, yet it is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony; and whether in any case a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question for the trial court.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

Wm. H. Chapman, Sullivan & Sullivan, and Theodore J. Roche, for Appellants.

O'Gara & De Martini, and Bert Schlesinger, for Respondent.

CHIPMAN, P. J.—The action was brought to obtain a decree adjudging plaintiff to be the owner of an undivided one-half interest in two certain promissory notes and mortgages, and directing the sale of said notes and mortgages and the payment to plaintiff of one-half of the proceeds of said sale and one-half of all interest collected and to be collected. The promissory notes, the subject of the action, were as follows: A note of date February 29, 1912, executed by Herman D. Hogrefe, and Bertha L. Hogrefe, for the sum of fifteen thousand dollars, payable to the order of T. J. Crowley, and Catherine Crowley, secured by mortgage on real estate. Also a note of date July 16, 1912, executed by J. D. Bocarde Drayage Company, a corporation, for the sum of eighteen thousand dollars, payable to the order of T. J. Crowley and Katherine S. Crowley, secured by mortgage on real estate.

Subsequently to the commencement of the action, as appears by a supplemental complaint, there was paid on the Hogrefe note the sum of fourteen thousand dollars to defendant Savings Union Bank and Trust Company in its individual capacity, of which sum one-half was paid to defendant Savings Union Bank and Trust Company as executor of the last will of Timothy J. Crowley, deceased. The balance, seven thousand dollars, was retained by it to await the determination of the ownership thereof by the court.

On January 5, 1909, T. J. Crowley and Katherine Crowley opened an account with the San Francisco Savings Union designated as Number 131,260. This corporation afterward changed its name to Savings Union Bank and Trust Company but the account continued under the same number. The account above referred to was opened pursuant to the following contract:

“San Francisco, Cal., Jany. 5, 1909.

“To the San Francisco Savings Union:

“All moneys now on deposit, or at any time hereafter deposited by or for us or either of us, to the credit of Timothy J. Crowley or Katherine, wife, ordy. deposit account No. 131,260, with the dividends thereon and accumulations thereof, are, and shall be, the joint property (with right of survivorship) of the undersigned, and are payable to us or either of us, or to the survivor of us, or to the executors, administrators or assigns of such survivor, without reference to the original ownership of such moneys, the act of so depositing said

moneys, being absolute termination of any original ownership thereof; and are subject to all national and state laws, governing such moneys, now or hereafter in force.

"This account may be terminated at any time by the board of directors of said San Francisco Savings Union; and the opening of this account is sufficient and complete evidence of the acceptance and ratification by said San Francisco Savings Union of the terms of deposit herein set forth, without other or further action on its part.

"(Signed) T. J. CROWLEY,  
"KATHERINE CROWLEY."

This contract remained with the bank from the day of its date until the action was tried, and under its provisions large and small sums of money were deposited with the bank to this account and both Mr. and Mrs. Crowley individually withdrew money as required by either or both from time to time until Mr. Crowley's death, January 21, 1913. The facts in connection with the execution of this contract, and the view this court entertains of its purpose and the intention of the parties in executing it, were fully discussed in the action bearing like title to the present action and numbered Civil No. 1476, decided March 16, 1916, *ante*, p. 144, [157 Pac. 516]. In that action the question involved was as to the ownership of the balance of the fund remaining on deposit to this account at the death of Mr. Crowley, and we held that this balance passed to Mrs. Crowley by right of survivorship. We also held that the declarations found in the will of Mr. Crowley were inadmissible as evidence of an intention other than that expressed in the deposit agreement. These questions we regard as settled and need not be considered in this opinion.

The case now here calls for a decision as to whether or not Mrs. Crowley is entitled to a one-half interest in the promissory notes or their proceeds above referred to. The facts upon which she rested her claim thereto are briefly as follows: When the Hogrefe note was executed there stood to the credit of this joint account the sum of \$37,241.63. For some reason not appearing, but for temporary purposes, the Crowleys jointly gave their one day promissory note to the bank for fifteen thousand dollars, and, as the transcript shows, "transferred to the credit of the cashier of the Savings Union & Trust Company \$15,000.00 from our term deposit No. 131,260, with the agreement that upon payment of said note, according to its

tenor said amount shall be retransferred to our said deposit account." This amount was loaned to Hogrefe, and he and his wife executed and delivered their note payable to the order of Mr. and Mrs. Crowley. Five days later a deposit was made to this joint account and the bank retransferred to that account fifteen thousand dollars and canceled the Crowley note.

The money for the Bocarde Drayage Company note was drawn from the said joint account, as was stipulated, "upon checks signed by Timothy J. Crowley alone, but that said moneys were so withdrawn with the consent of said Katherine Crowley." Both notes, as above stated, were made payable to Timothy J. Crowley, and one to Catherine Crowley, and the other to Katherine Crowley, or order, and so remained until Mr. Crowley's death. They were kept in his safe deposit box to which Mrs. Crowley had a key. She testified that she was consulted by her husband as to the advisability of making the loans and consented thereto; that he told her she "had just as much right to know where the money was as he had and he wanted me to be pleased; . . . that it was the joint money; that it belonged to me as much as it did to him. Q. Did you read the note [referring to the \$18,000 note]? A. Yes, sir. Q. Where was the property that you inspected? A. On Bryant; Bryant and White Place. I accompanied my husband at that time. Q. Did Mr. Crowley tell you that there were mortgages made to secure the payment of the notes? A. Yes, sir. The notes were put in the safe deposit box to which I had access. At all times I knew that both of these notes were made payable to me and my husband." Defendants objected to "any declaration which passed between the lady and her husband during the existence of the marriage relation as privileged" under section 1881 of the Code of Civil Procedure. The court overruled the objection, and this is the only alleged error occurring at the trial in the admission or rejection of testimony, and the only ruling to which objection is made except in refusing to admit the Crowley will in evidence.

Upon the principal question in the case the court made the following findings of fact: "1. That prior to and at the time of the death of Timothy Jay Crowley, plaintiff Katherine S. Crowley and Timothy Jay Crowley were the owners as tenants in common, of those two certain notes and mortgages that are

described in the complaint in the above-entitled action; and each of them was the owner of an undivided one-half of said two notes and mortgages as her and his separate property respectively; that since the death of said Timothy Jay Crowley, plaintiff has been and now is the owner of the undivided one-half of said two notes and mortgages as her separate property; and said Savings Union Bank and Trust Company, as trustee under the last will and testament of said Timothy Jay Crowley, deceased, has been and now is the owner of the other undivided one-half of said two notes and mortgages, to wit, the undivided one-half of said two notes and mortgages held by said Timothy Jay Crowley in his life time. . . . 8. That at the time of his death said Timothy Jay Crowley was not and prior thereto had not been the owner of both or either, or any of the notes and mortgages described in the complaint as his separate property and estate, or otherwise; that said Timothy Jay Crowley at no time was the owner of any interest in said notes and mortgages except an undivided one-half interest in and to each of said notes and mortgages, as his separate property and estate. That defendant Savings Union Bank and Trust Company, as executor of the last will and testament of Timothy Jay Crowley, deceased, is entitled to the possession of said notes and mortgages as cotenant thereof with plaintiff and not otherwise."

By its judgment the court awarded plaintiff the relief prayed for, except that it was adjudged to the best interests of the parties "not to order a sale of said promissory notes and mortgages or either of them at the present time, but to allow the parties to proceed to collect said notes and mortgages by suit or otherwise, reserving in this court full power to appoint a referee and to order a sale and a division of the proceeds thereof according to the interests of the parties as determined in this action whenever it shall be made to appear that a sale of said notes and mortgages or any of them would promote the interests of the parties." The appeal is from this judgment.

Had Mr. Crowley drawn out the money on his own initiative and loaned it to his own account, taking the notes to himself or order, a question might have arisen not now involved. He did not do this. On the contrary, the money was drawn from the bank by mutual consent and with a mutual understanding that Mrs. Crowley had the same interest in the money to be loaned as he did, and this understanding found expression in

the notes themselves by being made payable to the order of both Mr. and Mrs. Crowley. Section 686 of the Civil Code provides as follows: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property"; and "An interest in common is one owned by several persons, not in joint ownership or partnership." (Civ. Code, sec. 685.) Section 161 of the Civil Code, provides that "a husband and wife may hold property as joint tenants, tenants in common, or as community property," and section 164 provides that "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument."

In this state, either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried. (Civ. Code, sec. 158.) A husband may convey real or personal property to his wife and it was held, in *Carter v. McQuade*, 83 Cal. 274, 278, [23 Pac. 348], that "whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes and is thereafter to be treated as her separate property." (Citing cases.)

The following cases deal with section 164 of the Civil Code, and the presumption therein declared as to the wife receiving title to property by written instrument: *Alferitz v. Arrivilaga*, 143 Cal. 646, [77 Pac. 657]; *Fanning v. Green*, 156 Cal. 279, 282, [104 Pac. 308]; *Shaw v. Bernal*, 163 Cal. 262, [124 Pac. 1012].

Whether Mr. Crowley intended to transmute this money into separate or community property it seems to us immaterial, for whatever character it assumed when taken out of the bank it was immediately invested in the names of himself and wife, and we think the presumption followed that her interest in the investment was that of a tenant in common, for he ex-

pressly so provided by causing or allowing the notes and mortgages to be made payable to himself and wife.

In commenting upon section 164, the court said, in *Volguards v. Myers*, 23 Cal. App. 500, 505, [138 Pac. 963]: "It is true that the presumption established by section 164 of the Civil Code is not conclusive, but may be disputed and overthrown by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony (citing cases); and whether, in any case, a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question whose solution is solely with the trier of the facts."

There was no evidence offered in rebuttal of the presumption in the present case, unless the declaration of Mr. Crowley found in his will which was executed about a year after the Hogrefe note was given, and about six months after the execution of the other note, may be so regarded and this declaration we held in the former case, *supra*, was inadmissible. Aside from the investments themselves, whatever testimony is found in the record was given by Mrs. Crowley and tended to aid the presumption rather than rebut it. We think the foregoing findings were supported by the evidence.

The only remaining question relates to the alleged error in permitting Mrs. Crowley to testify as to statements made by her husband in relation to the loan of this money.

Counsel for both parties have with much industry collected the authorities *pro* and *con* the ruling. It does not seem to us necessary to decide the point. Mrs. Crowley's testimony is uncontradicted, as are certain important facts connected with the transaction otherwise appearing. It thus appeared, without contradiction, that the money which was the consideration for these loans was impressed with the character of joint ownership by the contract under which it was deposited with the Savings Union Bank and Trust Company; that Mrs. Crowley consented to its being drawn out and loaned to the makers of the notes and mortgages; that she joined in the note given to the bank temporarily when the loan was made to Hogrefe; that she visited and inspected the mortgaged property before the loan was made to Hogrefe; that she knew of the money being drawn for and consented

to the making of the loan to the Bocarde Drayage Company; that the notes and mortgages were given to Mr. and Mrs. Crowley jointly, and were kept in a safe deposit box to which Mrs. Crowley had access by a key which she carried. It is inconceivable that these facts were unknown to her husband, or that the transactions were consummated otherwise than with his full knowledge and consent. If it be conceded, for the purpose only of this opinion, that it was error to allow Mrs. Crowley to testify to her husband's declaration that the money belonged to her as much as to him, we cannot say that such error caused a miscarriage of justice. (Code Civ. Proc., sec. 475; Const., art. VI, sec. 41½.) This declaration by Mr. Crowley was not necessary to strengthen the presumption which the law attached to his acts. Everything he did goes to show beyond dispute that the fact was exactly what he declared it to be to his wife. It seems to us that it would be a gross miscarriage of justice to reverse the judgment for an alleged error in admitting evidence which was not essential to any finding of fact by the court, and without which the findings are amply supported.

The judgment is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 20, 1916.

---

[Crim. No. 333. Third Appellate District.—May 23, 1916.]

THE PEOPLE, Respondent, v. A. J. ANDERSON,  
Appellant.

CRIMINAL LAW—VIOLATION OF FISH LAW—JURISDICTION OF SUPERIOR COURT—CONSTRUCTION OF CODE AMENDMENT OF 1915.—Under the amendment of 1915 to section 636 of the Penal Code, (Stats. 1915, p. 606), the superior court has jurisdiction of the offenses defined in the various subdivisions of said section relating to the protection of fish, notwithstanding such subdivisions make a violation of the provisions a misdemeanor without specifying the penalty, as section 2 of such code section, which provides a punishment for the violation of

any of the provisions of the section, has reference to all of said subdivisions, and is not confined to the violation of the provisions of said section 2.

**ID.—CATCHING FISH BY NET—INFORMATION—SUFFICIENCY OF.**—It is not necessary in charging a defendant with unlawfully using a net for the purpose of taking fish in violation of subdivision 7 of section 636 of the Penal Code, that the information should state that the defendant was not one of the persons coming within the exception provided by subdivisions 10 and 12 of such section.

**ID.—PLACE OF CASTING NET—SUFFICIENCY OF INFORMATION.**—In such a case it is not necessary that the information should allege that the defendant was using a net for the purpose of catching fish "in the waters of the state," where the charge is in the language of the statute, and it is further alleged that the net was cast for such purpose "at the extreme end of and within Fly's Bay in the County of Napa."

**ID.—PUNISHMENT.**—A sentence upon conviction of such an offense to pay a fine of five hundred dollars, and, in default thereof, to be imprisoned in the county jail at the rate of one day for each two dollars of the fine is not excessive.

**APPEAL** from a judgment of the Superior Court of Napa County, and from an order denying a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Phillip B. Lynch, Frank M. Silva, and W. H. Morrissey, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

**CHIPMAN, P. J.**—Defendant was informed against by the district attorney of Napa County for the crime of violating the fishing laws of the state and was convicted of the crime charged. He moved for a new trial, which being denied, he was sentenced to pay a fine of five hundred dollars, and, in default thereof, to be imprisoned in the county jail at the rate of one day for each two dollars of said fine. He appeals from the judgment and order denying his motion for a new trial.

The charge was laid under subdivision 7 of section 636 of the Penal Code, the charging part of the information being as follows: "Did willfully and unlawfully cast, extend and use a net for the purpose of taking fish at and within Fish

and Game District No. Two (2) of the State of California, to wit: at the extreme northern end of and within Fly's Bay, in the County of Napa, State of California," etc. Subdivision 7 of said section of the Penal Code reads as follows: "Every person who, in fish and game districts numbers one, two, three, four, fourteen, twenty, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, shall cast, extend or use, or who shall assist in casting, extending or using any net for the purpose of taking fish, mollusks or crustaceans is guilty of a misdemeanor."

1. Defendant contends that the judgment should be reversed for want of jurisdiction, the contention being that the jurisdiction is in the justice's court, under section 19 of the Penal Code, for the reason that subdivision 7, *supra*, makes a violation of said subdivision a misdemeanor without specifying the penalty, in which case section 19 governs. It is further contended that, to hold that the superior court has jurisdiction, "it would be necessary to construe section 2 that follows subdivision 12 of section 636 as a part of section 636." Section 2, which follows subdivision 12 of section 636 of the Penal Code, reads: "Every person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, or by imprisonment in the county jail in the county in which conviction shall be had, not less than fifty days or by both such fine and imprisonment. . . ."

The supreme court, in *People v. Tom Nop*, 124 Cal. 150, [56 Pac. 786], held that, under section 636 of the Penal Code, prescribing only a minimum punishment "by a fine of not less than one hundred dollars, or by imprisonment in the county jail not less than fifty days, or by both such fine and imprisonment," for violation of the fish laws, the superior court had jurisdiction. (See *People v. Haagen*, 139 Cal. 115, [72 Pac. 836]; *People v. Palermo Land etc. Co.*, 4 Cal. App. 717, 721, [89 Pac. 723, 725].) We are only to determine the office of what is designated as "Sec. 2" of the act of May 19, 1915 (Stats. 1915, p. 606), and whether as a part of that act it refers to the preceding subdivisions.

Turning to the statute, we find it entitled: "An act to amend section six hundred thirty-six of the Penal Code of the State of California, relating to the protection of fish." Following the enacting clause the statute reads: "Section 1.

Section six hundred thirty-six of the Penal Code of the State of California is hereby amended to read as follows: 636. 1. Every person," etc. Then follow 12 subdivisions describing the different forms of violation which by each subdivision are made misdemeanors. Following subdivision 12 is found: "Sec. 2. Every person," etc., *supra*. The act purports to amend section 636 of the Penal Code and so declares in what is designated as "Section 1" of the act. It seems to us that, in the so-called "Sec. 2," where it is stated: "Every person violating any of the provisions of this section," etc., reference here is intended to be to section 636, the section being amended, and not to "Sec. 2" itself. There are no "provisions" mentioned in "Sec. 2" of which there may be violations. Manifestly, the direction as to payment into the state treasury to the credit of the fish and game preservation fund "for any violation of any of the provisions of this section" refers to section 636, the subject of the Amendatory Act, and does not refer to this "Sec. 2," and unless it refers to section 636, i. e., to all the subdivisions of that section, no authority is given to make disposition of the fines and forfeitures therein mentioned. We must give effect to this provision of the statute if it can reasonably be done. The effect we have given seems reasonable to us and no other is possible. Indeed, the paragraph has no meaning at all, and serves no purpose whatever unless it can be given the force we have attached to it.

2. It is further contended that the "information does not state that any public offense was committed." The grounds for this contention are: That there is no mention in the information that defendant is not one of the persons coming within the exceptions provided by subdivisions 10 and 12 of section 636 of the Penal Code. Subdivision 10 provides that the fish and game commission may recover fish from overflowed areas isolated by receding waters; and subdivision 12 authorizes the commission to take fish by nets or traps for scientific purposes. It is claimed "that the information, to have stated a public offense, should have charged defendant with taking, extending, or using a net for the purpose of taking fish, etc., from the *waters* of some prohibited part of the state. Yes, and the information would have to go further and show that the person taking fish from the *waters* by a

net, or otherwise, was no one of the excepted classes mentioned in subdivisions 10 and 12."

The rule as to the necessity to show in the information that the accused does not come within an excepted class is very clearly stated in *Ex parte Hornef*, 154 Cal. 355, 360, [97 Pac. 891], as follows: "The question is whether the exception is so incorporated with, and becomes a part of the enactment, as to constitute a part of the definition, or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception and not its location which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In this case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated it shall be negatived, otherwise it is a matter of defense." It was further said in the opinion that "such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford matter of excuse merely, they are to be relied on in defense." (Citing cases.) We think it was not necessary in the present case to allege that defendant was not a member of the fish and game commission.

Nor is there merit in the claim that the information is fatally defective because it fails to allege that defendant was using a net for the purpose of taking fish "in the waters of the state." The statute forbids the casting, extending, or using "any net for the purpose of taking fish," and the information is in the language of the statute, and it further states that the net was cast for such purpose "at the extreme end of and within Fly's Bay in the County of Napa." This, we think, was sufficient. A "bay" is defined as "an expanse of water between two capes or head lands." The place of casting the net is definitely stated as within a certain fish and game district and within a bay definitely referred to within Napa County. To allege that a net was cast in a certain bay for the purpose of taking fish implies that it was cast in waters. Fishermen do not cast their nets on land for the purpose of taking fish.

3. The court gave the following instructions: "The defendant is accused by information in this case . . . with violating the fish and game laws of the State of California as in said information set forth. . . . I instruct you that if you believe from the evidence beyond a reasonable doubt that the defendant cast, extended and used a net in the waters of Fly's Bay in Napa county as charged in the information, you must render a verdict of guilty, even that (though?) the evidence may be circumstantial or partially circumstantial." The point urged is that the second instruction is inconsistent with the first, in that the first refers to the information, and says nothing about waters, while the second instruction mentions the waters of Fly's Bay. There is no inconsistency apparent. In effect, the information charged the casting of a net in waters for the reason that a bay is composed of water. The second instruction made the fact charged more definite but cannot be said to have been inconsistent in any sense prejudicial to defendant.

4. The claim that the fine imposed was violative of the constitution of this state and of the United States as excessive is without merit. We do not think it can be said that the punishment was of such character as to be denominated "cruel or unusual" as contemplated by section 6, article I, of the constitution. (*People v. Oppenheimer*, 156 Cal. 733, [106 Pac. 74]; *In re O'Shea*, 11 Cal. App. 568, [105 Pac. 776].)

The judgment and order are affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

---

[Civ. No. 1592. First Appellate District.—May 24, 1916.]

MAXWELL BROWNE, Respondent, v. COMMERCIAL UNION ASSURANCE COMPANY OF LONDON, ENGLAND, (a Corporation), Appellant.

INSURANCE LAW—APPOINTMENT OF LOCAL AGENT—SCOPE OF AUTHORITY—CONSTRUCTION OF INSTRUMENT.—A local agent of an insurance company has no authority to make a binding contract of insurance under a letter of the general manager appointing him as agent for the transaction of insurance in a stated locality subject to such instructions as may from time to time be given him by the home

office, and providing therein that "policies will be written at the general office."

**ID.—GENERAL AND LOCAL AGENTS—DISTINGUISHING FEATURE.**—The authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during preliminary negotiations.

**ID.—AUTOMOBILE INSURANCE—MISTAKE IN APPLICATION—RETENTION OF POLICY AFTER KNOWLEDGE—ESTOPPEL.**—A holder of a policy of automobile insurance, who upon discovery of a mistake made by him and the local agent of the insurance company in attaching the wrong "rider" to his application for the policy, which they both believed covered risks against collisions, elects to retain the policy issued to him, and neither requests the issuance of a different policy, nor offers to pay the premium requisite to insure against the risk which he believed the rider to cover, thereby accepts the policy, and cannot in the case of a collision ask for reformation of the policy and judgment for damages from the collision.

**APPEAL** from a judgment of the Superior Court of Monterey County, and from an order denying a new trial. **B. V. Sargent, Judge.**

The facts are stated in the opinion of the court.

Goodfellow, Eells, Moore & Orrick, and Norris & Warth, for Appellant.

Daugherty & Lacey, for Respondent.

**LENNON, P. J.**—This is an action upon a policy of automobile insurance in which the plaintiff prays for judgment in the sum of \$1,350, the amount of a loss claimed to be due under the policy, and also prays that if in the judgment of the court the policy is to be construed as not covering the damage claimed, it be reformed so that it shall do so. The judgment of the court reformed the policy as prayed and awarded the plaintiff the sum demanded. The appeal is by the defendant from the judgment, and from an order denying its motion for a new trial.

As grounds for reversal of the judgment the appellant relies upon certain errors of law in the admission of evidence, and, principally, upon the proposition that the evidence in-

troduced showed no grounds for reformation, but disclosed that the policy issued by the defendant to the plaintiff was in accordance with the latter's application, and that it admittedly did not cover the loss sought to be recovered.

There is little contradiction in the evidence concerning the main facts of the case, and it may be summarized as follows:

The defendant Commercial Union Assurance Company was represented in Salinas by one Joseph Bordges, his appointment being made by the following letter written to him by the defendant's manager:

"Dear Sir:

*"Automobile Insurance.*

"On the nomination of special agent, Mr. F. J. H. Manning, you are hereby appointed agent of the Commercial Union Assurance Co. L'd., for the transaction of automobile insurance in Salinas, subject to such instructions as may be given you from time to time by this office.

"The rate of your commission will be 15 per cent.

"Policies will be written at this office, and will be sent to you promptly upon receipt of application.

"Yours truly,

"E. T. NIEBLING, Manager."

Bordges was supplied by the company with blank forms of application and certain slips to be attached to them, according to varying circumstances, called riders, one of which was designated as Collision Clause E. The form of policy issued by the company provided protection against certain risks in the body of it, and if protection against additional risks was desired one of these so-called riders would be attached to the application, the two documents thus attached constituting the demand for the insurance desired. These riders were in fact identical in language with the slip attached to the policy when issued, and which extended the terms of the policy so as to cover the additional risk. Applications for insurance were required to be made on the forms supplied by the company to its agent. Acting under his letter of appointment Bordges received applications, forwarded them to the company at its office in San Francisco, which, if the risk applied for was accepted, issued a policy, sent it to Bordges, who delivered it to the assured, collecting the premium therefor. In May, 1912, the plaintiff Maxwell Browne applied to Bordges for insurance on his automobile, and Bordges proceeded in conjunction with Browne to fill

out the application. The insurance desired was that covered by the main body of defendant's automobile policy, and also against damage to plaintiff's car caused by direct collision, to cover which it was necessary to attach both to the application and the policy a rider known either as Collision Clause A or B. During the process of filling out the application form the question arose as to which rider it would be necessary to attach to it, and some discussion was had between Browne, Bordges, and a third person in the office of Bordges who carried a policy of automobile insurance. Bordges produced a form of rider known as Collision Clause E, the language of which, so far as it operated to designate the additional risk to be insured against over and above those provided for in the main body of the policy to be issued, is as follows:

*"Damage to property" Without Deduction.*

"In consideration of ——— dollars additional premium, this policy also covers sums which the assured shall become liable to pay for damage to property (excepting to the property of others while in charge of the assured or of the assured's employees) or for legal expenses incurred with the consent of this company in connection therewith, through collision of the automobile herein described with any other automobile, vehicle or object, either moving or stationary, during the period insured."

The meaning of this clause and its suitability to be attached to Browne's application in order to procure a policy affording him the protection he desired, was discussed by Browne and Bordges. It appeared to both of them to be ambiguous in its meaning, but in the opinion of Bordges it was the proper rider to be attached, although he was evidently uncertain. Browne, who, though not a practicing lawyer, had been admitted to the bar, and had had some former experience in connection with the insurance business other than automobile insurance, carefully read over Collision Clause E, and coincided with Bordges in his opinion that it was the correct rider to be attached to his application. On this subject Bordges testified: "Collision Clause E was examined by Mr. Browne at the time. He read it. We discussed the clause. Mr. Browne took part in that discussion. Mr. Browne expressed his opinion that this clause covered all the damage to the automobile. He thought the same as I did that that was the correct one. Browne after he had examined the

clause agreed that this Collision Clause E which is attached to the application was sufficient for the purposes we had in mind. I knew and he knew that when the policy came back from the San Francisco office it would carry the same sort of form as was attached to the application."

Browne himself testified: "He [Mr. Bordges] was not quite certain himself at first, and after reading it [collision clause E] over with Mr. Thorp and myself we all agreed that the language was sufficient to cover it."

The application as thus prepared was signed by Bordges and Browne, and forwarded to the San Francisco office of the company, which thereupon issued a policy in accordance with the application, attaching to it the rider "Collision Clause E," and the policy was delivered to Browne.

About a month thereafter Browne's automobile was injured by coming into collision with an obstacle in the road. He thereupon made a claim upon the company for his loss, and was informed by it that his policy did not cover such loss,—that Collision Clause E only covered liability on the part of the assured to pay for damages inflicted upon the property of others resulting from a collision with his automobile, and not protection to him for loss which he might sustain by reason of such collision with his vehicle. Browne called at the office of the company in San Francisco, and there saw and talked with both Niebling, the manager, and William Ireland, the secretary. There is some contradiction in the testimony as to the exact conversation between Ireland and Browne, and Niebling and Browne, upon this visit; but there is none as to the fact that the amount of the loss claimed by Browne (\$35) was paid by the company, and that Browne was then unequivocally informed of the contention of the defendant that his policy did not cover such a loss. Browne himself testified: "In June or July, 1912, they said they were not liable for any such accident. . . . Mr. Niebling told me at that time that the policy did not cover that kind of a loss to my machine." Testifying as to what occurred during the negotiations for the settlement of this first loss Ireland stated: "On the occasion of the first accident I told him that the policy did not cover damage to his own car; that if he wished to have damage to his own car covered he should have taken out Clause A or B . . . and pay the additional premium. . . . I showed him the riders which would be at-

tached, and explained to him what the additional premium would be—\$120, in addition to the premium already shown on the policy.” Ireland was present at an interview between Browne and Niebling, as to which he testified: “I repeated to Mr. Niebling what I had told Browne. Mr. Niebling said that if Bordges told him (Browne) that the policy covered that affair that we would recognize it in that case as it was only a small claim. . . . We told Mr. Browne that future accidents of that sort would not be recognized. Mr. Browne said nothing in the way of assent. I remember Mr. Browne making this remark, that he understood our contention, and that he believed that that was the intention of the clause, but that it would not be sustained by the courts—that he had experience as an attorney. . . . Mr. Niebling finally told Mr. Browne that in view of the small loss in this accident at Colfax the company would stand that \$35, but they would not stand anything further.”

Niebling, testifying to his interview with Browne, said: “I said ‘I am not going to get into a controversy with you over \$35. As an *ex gratia* payment I will make this payment, and will not make any payment in the future.’ . . . Mr. Ireland, in my presence, explained to Mr. Browne that there was a different rate of premium when one had a rider attached covering damages to his own machine.”

A. E. Field, an adjuster of the company who made the adjustment of this \$35 loss, testified: “I informed Browne in July, 1912, that the intent of the Collision Clause E was to indemnify the automobile owner against damage he might do to somebody else’s property only, and that it was not intended to cover his own car.”

This matter being thus adjusted Browne took no step to either rescind his policy, or request the company to issue to him a new one which would without question insure him against damage to his automobile through direct collision; and matters remained in that condition when, in September of the same year, while being driven by himself, his automobile came into collision with another vehicle and was damaged to the extent of \$1,350. He made claim upon the company for this amount, and was refused payment upon the ground that in the opinion of the company such a loss was not covered by the policy. Browne called on Mr. Niebling to urge his claim. In testifying as to this interview Mr.

Niebling said: "My second conversation with Browne was in September after the second accident. He came in and said he claimed an accident, and also quoted some of the statements Mr. Ireland made to him, and I told him, 'Mr. Browne, you recall very distinctly what I told you several months ago, that this clause did not cover this kind of damage, and that while I would make it *ex gratia* because it was too trifling an amount to get into a discussion about, you know perfectly well what I told you.' 'Well,' he said, 'I don't agree with you.' . . . When I told Browne to recall this previous conversation with him he did not deny that that was the previous conversation as I have stated. He merely denied that my conclusions were correct." This testimony of Niebling is not denied by Browne, except Browne does deny that Niebling told him that the company would not in the future recognize such a loss.

Upon the facts as thus testified to it is the contention of the appellant that the policy issued to Browne was the one he applied for; that it does not cover the loss sought to be recovered, and that, in any event, after the first accident and its settlement Browne, by retaining his policy and not offering to pay the additional premium chargeable upon a policy of the character claimed to have been requested of Bordges, is in no position to ask for reformation of his policy, and that the court erred in finding in favor of Browne and giving judgment in his favor.

In support of the judgment it is urged by the respondent that the foregoing facts establish that Bordges was authorized to enter into contracts of insurance binding upon the defendant; that it was the intention of the parties by their contract to insure plaintiff against the damage admitted to have been sustained by him, and that he having paid the premium demanded by the defendant, is entitled to have the policy reformed so as to cover such damage; and further, that the defendant by its action in recognizing and paying the first claim, and not at that time canceling the policy, is now estopped to deny that the policy covers the loss sought to be recovered. In urging this last contention the respondent lays stress upon an incident that occurred during the negotiations leading up to the settlement of the first loss. Ireland at that time had computed that the additional premium on the policy claimed by Browne to have been contracted for by

him would be \$120, and so stated to the manager in the presence of Browne, whereupon, according to the testimony of the latter, Ireland said that if the company settled with him for that particular accident Browne would still owe the company money, to which Mr. Niebling replied, "No, he has paid all he was asked for, and he evidently did not get what he should have got."

We think it clear under the evidence that Bordges, the Salinas agent of the defendant, had no authority to make a binding contract of insurance; and that the general language of the letter appointing him as agent "for the transaction of automobile insurance" is to be construed in connection with the further language of the letter: "Policies will be written at this office," and with the conduct of the parties under it. There is no question in this case of ostensible agency; and the evidence as to what took place between Bordges and the plaintiff at the time of the application for the policy clearly shows that Bordges was doing nothing more than preparing the plaintiff's application for the purpose of forwarding it to the insurance company. The word "Written," in the phrase "Policies will be written at this office," evidently means something more than the mere physical act of filling in the blanks of an insurance policy. Insurance "written" is insurance contracted for. Consequently the consummation of the contract in controversy was dependent upon its ultimately being written at the general office in San Francisco. There was, therefore, no completed contract of insurance until the policy applied for was written and delivered; and it is settled that the authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during the preliminary negotiations (*Sharman v. Continental Ins. Co.*, 167 Cal. 117, [52 L. R. A. (N. S.) 670, 138 Pac. 708].)

As to whether the applicant for insurance would have any legal remedy against the company other than that of rescission of his contract upon discovering the mistake in his application it is not necessary in this case to determine, in view of the evidence which shows that upon discovering the mis-

take, and knowing that the defendant took the position that loss by direct collision was not covered by the policy, the plaintiff nevertheless elected to retain it, and neither requested the defendant to issue to him a different policy, nor offered to pay the premium requisite to insure against the risk which he claimed to have applied to be covered in the first place. By so doing he accepted the policy issued to him as complying with his application for insurance (*Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, [67 L. R. A. 705, 89 N. W. 538, 540, 92 N. W. 247]; *Plympton v. Dunn*, 148 Mass. 523, [20 N. E. 180]; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, [142 Pac. 51].) We cannot distinguish such a case from that where a person ordering goods of a particular kind, his vendor sends him goods of a different kind, and the purchaser after discovering the mistake elects to retain the goods delivered, and pays no more than the price of those goods.

The respondent seeks to escape the effect of his inaction by the contention that he was justified, by the answer made by defendant's manager to Mr. Ireland above quoted, to wit, "No, he has paid all he was asked for, but he evidently did not get what he should have got,"—in assuming that the company would in the future recognize liability for losses by direct collision as included within the plaintiff's policy. We think that no such inference can be drawn from the language used by Niebling. It was a remark addressed not to the plaintiff (although in his hearing), but to an officer of the company; and it was not made in reply to any offer of the plaintiff to pay the increased premium. It cannot be segregated from the remainder of the evidence concerning the discussion of which it was a part, and considered alone. It was Niebling's contention, known to the plaintiff, that the policy did not cover the loss for which claim had been made. The claim was for a small amount; and nothing was more natural than that the manager of the company, recognizing that the plaintiff had been misled by the company's agent into applying for a policy different from the one he desired, should be willing to make plaintiff whole up to that time without additional charge; but no inference could properly be drawn therefrom that he was willing that such losses should be recognized in the future now that Browne no longer labored under any misapprehension or mistake. The true reason for the plaintiff's inaction suggested by the evidence

is rather that he was still of the opinion that his policy covered the character of loss in dispute, and that if the question ever came to be litigated the courts would sustain his view. The circumstances attending the settlement by the company of Browne's first loss are entirely insufficient to constitute an estoppel as against the defendant, nor was such an estoppel an issue in the case.

For the reasons above set forth we are of the opinion that the findings of the court in favor of the plaintiff are not supported by the evidence, and that it erred in holding that the policy of insurance sued upon should be reformed, that the defendant was estopped to deny that it was liable for the amount claimed by plaintiff, and in giving judgment in his favor.

The judgment and order are reversed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 20, 1916.

---

[Civ. No. 1824. First Appellate District.—May 25, 1916.]

M. G. WEST, Appellant, v. CITY OF OAKLAND (a Municipal Corporation) et al., Respondents.

**CITY OF OAKLAND—AWARD OF CONTRACT FOR JAIL IN CITY HALL—DISCRETION OF CITY COUNCIL—CONSTRUCTION OF CHARTER.**—The city council of the city of Oakland, under the provisions of sections 126 and 130 of its charter, has a discretion in awarding a contract for the construction of a jail in its city hall to the "lowest responsible bidder," to consider the quality of the respective locking devices upon which the various bids were predicated, and is not required to award the contract to the lowest responsible bidder subject to the only limitation that such bidder shall not have been "delinquent or unfaithful in any former contract with the city."

**ID.—MEANING OF TERM "LOWEST RESPONSIBLE BIDDER"—DISCRETION OF COUNCIL.**—The term "lowest responsible bidder" means the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work; and, where

by the use of these terms the council has been invested with discretionary powers as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts in the absence of direct averments and proof of fraud.

**Id.—INVESTIGATION OF JAIL-LOCKING DEVICES—CO-OPERATION OF UNSUCCESSFUL BIDDER—LACK OF AUTHORITY OF COUNCIL NOT SUBJECT TO QUESTION.**—An unsuccessful bidder for the installing and furnishing of a jail in a city hall cannot complain that the municipal board had no authority to make investigations into the merits of the locking devices submitted by the various bidders on the ground that the plans and specifications did not call for or require the submission of models of devices, nor provide for comparison of the respective devices, where such bidder co-operated with the board in making such comparisons and investigations to the extent of exhibiting before the board a working model of its particular device, and of suggesting the names of cities where experts might observe jails where such device was in actual operation.

**Id.—AWARD OF BID—SPECIFIC FINDING NOT REQUIRED.**—It is not necessary for a municipal board in making a record of its action in the rejection of bids to also make an entry of its reason for so doing, but the real reason may be shown upon the trial of the case involving the integrity and action of the board.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. William H. Donahue, Judge.

The facts are stated in the opinion of the court.

R. H. Cross, and Arthur H. Brandt, for Appellant.

T. C. Van Ness, Jr., Ben F. Woolner, City Attorney, and Charles A. Beardsley, Assistant City Attorney, for Respondents.

**RICHARDS, J.**—This is an appeal from a judgment in favor of the defendants, and from an order denying a new trial.

The facts of the case are these: The city of Oakland being about to construct a jail in the upper stories of its city hall, advertised for bids for furnishing and installing said jail. It is conceded that in all respects the legal steps leading up to the award of the contract for such jail construction were duly

and regularly taken. In the call for bids the council directed the attention of prospective bidders to the plans and specifications of the proposed work, and required that all bids should be prepared and submitted in accordance therewith. A very material element in the mechanical construction of a modern jail is the locking device; and with reference to this portion of the furnishings to be bid upon, the plans and specifications provided that "The locking device should be simple in construction and operation and entirely free from complicated parts liable to unusual wear. The device shall have positive lever action; shall have indexes indicating the number of each cell so that the operator can set with the lever each door or the entire bank of cells, which shall then with a single movement of the main operating levers open or close any one door or all." With respect to locking devices for jails the record sufficiently shows that there are several kinds, or rather, designs of these devices differing in mechanical construction, and either patented or controlled by different companies, who are competitors for the installation each of its own particular form or design of locking device. There were four competitors who responded to the defendant's call for bids—the M. G. West Company, the Pauly Jail Building Company, the Waterhouse & Price Company, and the Ralston Iron Works, Inc. The M. G. West Company submitted with its bid a design of locking device known as the Stewart locking device, which it offered to install in connection with the rest of the work bid upon for the sum of \$24,528.50. The Pauly Jail Building Company submitted its own pattern of locking device with its bid for the entire work in the sum of \$30,127. The other two bidders were still higher in their bids by several thousand dollars. When the bids were opened the officials of the city council held several sessions for the purpose of investigating the merits of the several locking devices presented, and even sent experts in jail construction to the city of Sacramento, and also to the city of Portland, Oregon, where the M. G. West Company had installed the Stewart design of locking device identical with that which it was proposed by said company to install in Oakland under its bid; but the city council, after quite a careful and exhaustive investigation, found that the Stewart locking device was unsatisfactory in both design and operation, and that it did not meet in these respects the requirements of the plans and specifications; while on the

other hand, the locking device of the Pauly Jail Building Company did measure up to those requirements. The city council therefore rejected the bid of the M. G. West Company, although it was the lowest in price, and accepted the higher bid of the Pauly Jail Building Company, whereupon this plaintiff, as a citizen and taxpayer of the city of Oakland, instituted this proceeding to have set aside and canceled the award of the contract for the work to the Pauly Jail Building Company, and the contract made in accordance therewith, and to enjoin the other officials of the city from the payment of any money due or to become due in the course of its execution.

The court rendered its judgment upon the trial of the cause in favor of the defendants, and denied a motion for a new trial, whereupon the plaintiff prosecutes this appeal.

It was not averred by the plaintiff in his pleadings, nor sought to be proven upon the trial of the cause, that the city council of Oakland, or any of the members thereof, acted fraudulently or corruptly in making the award of the work in question to another than the lowest bidder for such work; but the appellant relies for his success upon this appeal upon his construction of certain provisions of the city charter of Oakland with respect to the award of contracts after competitive bidding for public work. The sections of the city charter thus relied upon by the appellant are sections 126 and 130 thereof. Section 126 is entitled "Requirements for bids," and after providing with much of detail for the form and method of bidding, and for the opening and examination of bids, goes on to declare that the city council "shall award the contract to the lowest bidder except as otherwise in this charter provided." It also provides that "The council or board, as the case may be, may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contract with the city, and all bids other than the lowest regular bid."

Section 130 of the charter is entitled "Public Work to be done by contract," and provides in part as follows: "In the erection, improvement and repair of all public buildings and works, in all streets and sewer work, and in all work in and about streams, bays or water-fronts, or in or about embankments or other works for protection against overflow or erosion, and in furnishing any supplies and material for the same, or for any other use, by the city, or in the purchasing

of any supplies to be used by the city, when the expenditure required for the same exceeds the sum of \$500, it shall be done by contract, and shall be let to the lowest responsible bidder after advertising for five consecutive days in the official newspaper for sealed proposals for the work contemplated or supplies to be furnished."

It is the contention of the appellant that these two sections of the city charter of Oakland are to be read and construed together, and that when so construed the term "lowest responsible bidder" as used in the body of section 130 thereof, and which has reference specially to the construction and equipment of public buildings, is to be held to mean only that the lowest responsible bidder shall be the lowest bidder who has not been delinquent or unfaithful in any former contract with the city; and that otherwise, in every case of contracts awarded by competitive bidding, the council must either award the contract to the lowest bidder or must reject all bids.

We are of the opinion, however, that this is altogether too narrow and binding a construction to place upon these provisions of the Oakland city charter. There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device which each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as "lowest and best bidder," or as "lowest responsible bidder," and the like; and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters in the absence of other limiting clauses. The term "lowest responsible bidder" has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work; and that where by the use of these terms the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts in the absence of direct averments and

proof of fraud. (2 Dillon on Municipal Corporations, 5th ed., sec. 811, p. 1223, and cases cited.) And even when in statutes and charters the term "lowest bidder" only is employed, the courts have held that in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered. (*Clapton v. Taylor*, 49 Mo. App. 117; *Cleveland Fire-Alarm Co. v. Metropolitan Fire Commrs.*, 55 Barb. (N. Y.) 288.) In fact, it is conceded by counsel for the appellant that if, under a fair and liberal construction of this charter the city council had discretion, in awarding the contract to the lowest responsible bidder, to consider the quality of the respective devices upon which the several bids were predicated, such discretion honestly exercised will not be interfered with. We think it evident that the city charter of Oakland is to be given such a construction, and that this is a very appropriate case for the application of the principles above set forth in determining which was the lowest responsible bidder for the furnishing of devices and material to be used in outfitting the city jail; and that in the exercise of its discretion in determining this issue the city council is not only shown not to have acted corruptly, but on the contrary is shown to have arrived at its conclusions with quite commendable circumspection and care.

It is, however, insisted by the appellant that since the plans and specifications did not call for nor require the submission of models of locking devices, nor provide for comparison of the merits of the respective devices of the several bidders, the council had no authority to make such investigation, nor to determine as to which bidder otherwise financially responsible was presenting the most suitable and practical device.

A sufficient answer to this contention is that apparently the M. G. West Company, far from objecting to these comparisons and investigations, co-operated with the city council in making them to the extent of exhibiting before that body a working model of its particular locking device, and of suggesting the names of cities where the experts of the city council might observe jails wherein the Stewart locking device of the precise pattern it proposed under its bid to install might be observed in actual operation. The M. G. West Company having thus submitted to the method adopted by the city council for de-

termining the issue before it, the appellant cannot here be held to complain that the action of that body was in that respect beyond its power.

It is also contended by appellant that it was the duty of the city council, upon determining that the M. G. West Company was not the lowest responsible bidder, to make a specific finding to that effect. Whatever the rule upon that subject may be in other jurisdictions, the question has been determined in this state adversely to the appellant's contention in the case of *Rice v. Board of Trustees*, 107 Cal. 398, [40 Pac. 551], wherein it was discussed and decided that it was not necessary for a municipal board in making a record of its action in the rejection of certain bids, to also make an entry of its reason for so doing, but that the real reason for its action might be shown upon the trial of the case involving the validity and integrity of the action of the board.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 24, 1916.

---

[Civ. No. 1450. Second Appellate District.—May 25, 1916.]

ARCHIE J. HICKS, Respondent, v. HARRY J. BUTTERWORTH, Appellant.

**ANIMALS—TRESPASS LAW OF 1907—EFFECT UPON FENCE LAW OF 1878—LOS ANGELES COUNTY.**—The act of 1878 concerning the trespassing of animals upon private lands in certain counties in the state of California (Stats. 1877-78, p. 176), which act and the provisions thereof were, by an amendment thereto approved March 30, 1878, (Stats. 1877-78, p. 878), made to include the county of Los Angeles, was not, as to such county, repealed by the act of 1907 (Stats. 1907, p. 999), and therefore in such county, an action for damages for trespass by animals can be maintained, irrespective of whether or not the land trespassed upon was inclosed, or whether or not it was planted to crops growing or matured.

**ID.—REPAIR OF FENCE—FAILURE TO CLOSE GATES—IMMATERIAL MATTERS.**—In an action to recover damages for trespass by cattle in

entering upon the land and destroying growing alfalfa and sacks of hay thereon, it is immaterial, in the county of Los Angeles, that the plaintiff failed to keep the fence inclosing his land in repair, or that he failed to keep the gates leading thereto closed.

**ID.—DAMAGES TO CROPS—PLAINTIFF AS TENANT—EXTENT OF RECOVERY—INSTRUCTION.**—In such an action there is no error in refusing to instruct the jury that, if the plaintiff was not the owner of the land, but leased it upon the terms and conditions known as "farming on shares," and the crops growing thereon belong partly to the plaintiff and partly to the owner of the land, the plaintiff could only recover for damages done to that portion of the crop belonging to him, where by the terms of the lease the owner had no interest in the crop until the same had been set apart to him by the plaintiff, and the evidence failed to show that a division had been made at the time of the trespass.

**APPEAL** from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Dooling, Judge presiding.

The facts are stated in the opinion of the court.

Will H. Willis, and Davis & Rush, for Appellant.

Harriman, Ryckman & Tuttle, for Respondent.

**SHAW, J.**—Action to recover damages alleged to have been sustained by plaintiff on account of trespass committed by defendant's livestock.

The case was tried before a jury which rendered a verdict in favor of plaintiff, upon which a judgment was entered against defendant, whose motion for a new trial was denied and from which order he appeals.

It appears that plaintiff was a tenant in possession, under a lease from the owner, of the premises involved, upon which at the time of the trespass he had certain fields of alfalfa growing, and a lot of unbaled hay in the stack; that during the period extending from July 1 to November 1, 1910, defendant's neat cattle entered upon said land, ate and destroyed the growing alfalfa and stacks of hay thereon.

Neither the complaint nor proof showed the premises to have been at the time inclosed by a substantial fence, and appellant, conceding the trespass and resultant damage as alleged, insists that plaintiff is not entitled to recover therefor. In 1878 the legislature passed an act entitled, "An act con-

cerning trespassing of animals upon private lands in certain counties in the State of California" (Stats. 1877-78, p. 176), which act and the provisions thereof were, by an amendment thereto approved March 30, 1878 (Stats. 1877-78, p. 878), made to include the county of Los Angeles. This act provides:

"Section 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal.

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all damage sustained by reason of any such trespass, together with costs of suit."

Under the act of 1878 just quoted, no doubt exists as to the plaintiff's right to recover damages for the trespass, since under its provisions he was not required to inclose his land with a fence, substantial or otherwise. Appellant, however, insists that said provisions of the act of 1878 were repealed by an act of the legislature entitled, "An act concerning trespassing of animals upon private lands, and the recovery of damages resulting therefrom" (Stats. 1907, p. 999), sections 1, 2 and 6 of which are as follows:

"Section 1. It is unlawful for any person, firm or corporation owning, or having possession of, any animal, to suffer or permit such animal to break into and enter upon any land owned by, or lawfully in the possession of any person, firm or corporation, other than the owner of such animal in all cases where such land is planted to growing crops, vines, fruit trees, or vegetables, and is at the time entirely inclosed by a substantial fence or other inclosure.

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal or animals, all actual damages sustained by reason of such trespass, together with costs of suit.

"Sec. 6. All acts and parts of acts in conflict with this act are hereby repealed; *provided*, nothing in this act shall be deemed or construed to repeal an act of the legislature of this state relating to estrays, approved March 23rd, 1901."

If, as claimed by appellant, the act of 1907 supersedes the provisions of the act of 1878, then it is likewise clear that plaintiff is not entitled to recover damages by reason of the trespass, since it is not claimed the premises were inclosed in any manner whatsoever. In effect, the act of 1878, as at common law, requires the owner of stock to fence them in, and no duty devolves upon the owner of land to inclose the same in order to prevent his neighbor's stock trespassing thereon, and unless repealed by the act of 1907, it is the law in Los Angeles County applicable to the facts of this case.

Appellant has presented a very able and exhaustive brief in support of his contention that the later act repeals that of 1878; and were the question an open one, we would feel constrained to follow counsel through the maze of legislation touching the subject, commencing with the first session of the legislature in 1850, to which he directs attention. The identical question, however, was before the court in the case of *Blevins v. Mullally*, decided by the third appellate district (22 Cal. App. 519, [135 Pac. 307]). The action arose from a trespass of stock upon land in Colusa County, to which the act of 1878 applied, and, as here, it was there contended that such act was repealed by the act of 1907. The court, however, held otherwise, saying there was no inconsistency between the common-law rule as declared in the act of 1878 and the statute of 1907, and hence there was no repeal of the provisions of the former. This being true, it follows that in Los Angeles County one sustaining damage by reason of trespassing animals upon his uninclosed land may, under the provisions of the act of 1878, recover therefor, regardless of whether the crops be growing thereon or matured, as alfalfa hay, and stacked thereon.

It is unnecessary to repeat the argument upon which the court, through Justice Hart, based its conclusion; suffice it to say that a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court. Hence, thus approved, the question, so far as this court is concerned, is no longer an open one. Upon the authority of the decision in *Blevins v. Mul-*

lally, 22 Cal. App. 519, [135 Pac. 307], we are constrained to hold that the act of 1878, the effect of which, as at common law, is to require the owners of stock to fence them in, is, so far as Los Angeles County is concerned, still in force, and that plaintiff's failure to maintain a substantial fence inclosing his land did not affect his right to recover damages for the trespass.

From what has been said, it follows that no error was committed by the court in refusing instructions requested by defendant based upon his theory that the law imposed upon plaintiff the duty of fencing his land as a protection against damages by trespassing animals. The fact that plaintiff did not keep the fence inclosing the land in repair, or failed to keep the gates closed, becomes immaterial.

It is next insisted that the court erred in charging the jury "that the undisputed evidence in this case shows the plaintiff had such possession and interest in the land here in question, the crops and herbage growing thereon and the hay stacked upon the land, to enable him to maintain an action for the damage done thereto by trespassing cattle." And in refusing, at defendant's request, to instruct the jury to the effect that if plaintiff was not the owner of the land in question, but leased it upon terms and conditions known as "farming on shares," and the crops growing thereon belonged partly to the plaintiff and partly to the owner of the land, then, in such event, plaintiff could recover only for damages done to that portion of the crop belonging to him, and could not recover damages for any portion belonging to the landlord. This contention is based upon the claim that plaintiff and the landlord were owners in common of the crops grown upon said land. By the terms of the lease made to plaintiff, he, as rental for the land, agreed to cut the alfalfa crops grown thereon, at his own cost, charge, and expense, and stack the same upon the said premises, and in due and proper time bale the same and deliver to the landlord an amount in tonnage equal to one-half of all alfalfa cut on said premises, which one-half should be set apart to the landlord. Clearly, the relation existing between the parties was that of landlord and tenant. The lease contains no provision indicating that the products were to be held in cotenancy, but were held and controlled by the tenant, one-half thereof, when baled, under the terms of the lease, to be set apart to and paid the landlord

as compensation for the use of the land. (*Coalinga Pacific Oil etc. Co. v. Associated Oil Co.*, 16 Cal. App. 361, [116 Pac. 1107]; *Clarke v. Cobb*, 121 Cal. 595, [54 Pac. 74]; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, [68 Pac. 708].) The record discloses no evidence that the crop had been divided as provided in the lease, or any portion thereof set apart to the landlord. Under these facts, there was no error in the instruction given. As said by the court in *Reeves v. Hannan*, 65 N. J. L. 249, [48 Atl. 1018], in discussing a like question: "The agreement . . . being a lease, the title of the crops produced did not vest in the parties to it as tenants in common, but solely in Reeves, the tenant; and Hannan, the landlord, had no claim upon them until an actual division was made, and his share was turned over to him as a 'reditus' or rent."

The order appealed from is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 24, 1916.

---

[Crim. No. 493. Second Appellate District.—May 25, 1916.]

In the Matter of the Application of NEWTON WILSON, for  
a Writ of Habeas Corpus.

**CRIMINAL LAW—CONSTRUCTION OF STATUTE—HEADNOTES.**—Headnotes of the sections of the codes as adopted in 1872 are integral parts of the codes themselves and are to be given effect according to their import.

**ID.—PRESENTING FALSE PROOF ON CLAIM FOR ACCIDENT INSURANCE—CONSTRUCTION OF SECTION 549, PENAL CODE.**—Section 549 of the Penal Code does not include the offense of presenting a false or fraudulent claim upon a contract of accident insurance, and one convicted under an information attempting to charge such an offense will be discharged on *habeas corpus*.

APPLICATION originally made to the District Court of Appeal for the Second Appellate District, for a Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

Davis & Rush, for Petitioner.

Thomas Lee Woolwine, District Attorney, and George E. Cryer, Deputy District Attorney, for Respondent.

CONREY, P. J.—The petitioner is held in custody by the sheriff of Los Angeles County under a commitment issued out of the superior court. The commitment has been issued pursuant to a judgment pronounced against petitioner in a criminal action, and requiring that he be punished by imprisonment in the state prison. Petitioner's claim that the commitment is illegal and void is based upon the proposition that the information in the action does not charge a public offense.

The accusation set forth in the information was that the defendant committed the crime of presenting false proofs in support of a claim upon a policy of insurance; the policy in question being one of insurance against accident. If any offense is charged against the petitioner by that information, it must be an offense coming within the terms of section 549 of the Penal Code. If that section does not include the presentation of a false or fraudulent claim, or proofs in support of such claim upon a contract of accident insurance, then the information states no criminal offense. Sections 548 and 549 are contained in chapter XI of title XIII, part I, of the Penal Code. The chapter heading and section headings pertinent to this chapter and these sections have not been changed, nor have the sections been amended since the enactment of the code in 1872. The chapter heading is, "Fraudulent destruction of property insured." The headnote of section 548 is, "Burning or destroying property insured." The headnote of section 549 is, "Presenting false proofs in support of a claim upon policy of insurance." These are not mere editor's notes, but are integral parts of the code itself. This will be seen by referring to the commissioners' certificate following the title page of the Penal Code in its original edition and the statutory provisions therein mentioned. The same situation exists with respect to the other codes of this state adopted at the same time. In *Sharon v. Sharon*, 75 Cal. 1, at page 16, [16 Pac. 345], referring to the Civil Code, the

supreme court said: "Each article of the code is preceded by head-notes, numbered to correspond with the sections following, and purporting to give in brief the subject of each of such sections. These head-notes are entitled to more consideration than the 'title' to an entire act. They are parts of the statute limiting and defining the sections to which they refer. To refuse to give effect to them according to their import would be to make the law, not to administer it." In *Bettencourt v. Sheehy*, 157 Cal. 698, [109 Pac. 89], referring to the marginal notes contained in the original edition of the Political Code, it was said: "The marginal notes to the sections of the original codes cannot be distinguished in principle from the head-notes to the chapters, articles, and titles. As to these it has been held that they are parts of the statute limiting and defining the sections to which they refer, and that to refuse to give effect to them according to their import would be to make the law, not to administer it."

Reading together the chapter title and the headnotes, together with the text of sections 548 and 549, we find that the offenses therein described have reference to cases in which property has been destroyed or injured, or where false or fraudulent claims or proofs of claim are presented upon contracts of insurance against losses incident to injury to property or destruction thereof. The failure of the legislature to give to this chapter a broader scope so as to include accident insurance, may be attributed to the fact that insurance contracts of that kind are of modern origin, and in the year 1872 casualty insurance was not yet a common or well-known class of business. Being of the opinion that the information does not state or describe a criminal offense, we conclude that the petitioner is entitled to be released, and it is therefore ordered that he be discharged from custody.

James, J., and Shaw, J., concurred.

[Civ. No. 1511. Third Appellate District.—May 25, 1916.]

**JOE HAY, Respondent, v. MARTIN E. CASEY et al.,  
Appellants.**

**VENDOR AND PURCHASER—DEFAULT OF VENDEE—WHEN ENTITLED TO RETURN OF MONEY PAID.**—A vendor after a breach of a contract of sale by the vendee, may agree to a mutual abandonment and rescission of the contract, and in such a case, the vendee is entitled to a repayment of the moneys paid.

**ID.—AGREEMENT CANCELING CONTRACT—REPAYMENT OF VENDEE—SUFFICIENCY OF EVIDENCE.**—An agreement made between a defaulting vendee and the vendor canceling the contract of sale, and giving a third party a thirty-day option to sell the property, and providing that the vendee shall be repaid out of the money fixed as the sale price, the amounts paid by him under the contract, and that in the event that the sum be not paid the vendee shall receive nothing and shall have no further claim in the property, is not a waiver of the rights of the vendee, in the event of a failure of the third party to make the sale, as there is no consideration for the waiver, and where the vendor afterward makes a sale of the property, and orally promises to repay the vendee when the sale is made, the vendee is entitled to recover.

**APPEAL** from an order of the Superior Court of Yuba County denying a new trial. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

Richard Belcher, and W. H. Carlin, for Appellants.

Britton & Raish, and Wetmore & Davies, for Respondent.

**HART, J.**—On February 13, 1909, a written agreement was entered into between the parties to this action, by the terms of which appellants agreed to sell and respondent agreed to buy, for the sum of seven thousand five hundred dollars, certain real property in the city of Marysville. Nine hundred dollars was paid by respondent at the time of the execution of the agreement, the balance being payable in monthly installments. In addition to the first payment of nine hundred dollars, plaintiff claims to have paid nine hundred dollars, and defendants admit receiving eight hundred dollars, but whether during the life of said contract or under

a succeeding one does not clearly appear. On the 4th of March, 1910, a second contract was entered into for the sale of the property, at a consideration of \$5,893, payable in installments. Default being made by plaintiff in all or some of these payments, on May 23, 1910, a third contract was executed, the purchase price being specified as \$5,916. On this contract also default was made by plaintiff.

On October 22, 1910, appellant, Martin E. Casey, as party of the first part, J. Ross Traynor, as party of the second part, and respondent, Joe Hay, as party of the third part, entered into a written agreement by which said Traynor was given a thirty-day option to sell said property for the sum of eight thousand dollars, and appellant, Martin E. Casey, and respondent therein agreed that the contract of May 23, 1910, "shall be and hereby is canceled and declared null and void. . . . In consideration of which said party of the first part agrees to pay said party of the third part," out of said eight thousand dollars, the sum of one thousand eight hundred and fifty dollars, less certain bills for lighting, water, taxes, etc. "In the event said eight thousand dollars be not paid in accordance with this agreement said party of the third part shall receive nothing and shall have no further right, title, claim, or interest in or to any part of said land, premises, or personal property."

In each of the above-mentioned contracts time was made of the essence.

On January 25, 1911, appellants entered into an agreement with one T. J. Tyrell for the sale of said property for the sum of six thousand dollars, and, on April 21, 1911, pursuant to said contract, the property was deeded to one Barney Van Buskirk.

In the complaint it is alleged: "On or about the 9th day of February, 1911, and while said plaintiff was in possession of said real property under said contract as aforesaid (the contract of February 13, 1909), said plaintiff and defendants entered into an agreement whereby plaintiff agreed to cancel and rescind the said contract hereinabove referred to in consideration of the payment to plaintiff by defendants of all the sums of money paid by plaintiff to defendants, together with the sums of money expended by said plaintiff in repairing and improving said real property amounting in

all to the sum of \$2,870.00," and the complaint prays judgment in that amount.

In their answer defendants denied that they entered into the agreement, above quoted, to pay plaintiff the sum of \$2,870, or that plaintiff rescinded the contract of February 13, 1909; but they allege that the payments provided for in the contract of October 22, 1910, to be made by said Traynor, were never made by him, "and at the expiration of the time in said agreement provided, defendant Casey exercised his right and declared the same forfeited and null and void."

The court found that, under the contract of February 13, 1909, plaintiff entered into possession of the property and remained therein continuously until January 25, 1911, and that "defendants had and received of the plaintiff, under said contract, the sum of \$1,700.00." Finding No. 5 is: "That on or about the 4th day of March, 1910, the said plaintiff and defendants mutually agreed to rescind the contract of February 13, 1909." There are similar findings as to the contracts of March 4, 1910, and May 23, 1910. Respecting the Traynor contract, of October 22, 1910, the court found "that there was no consideration for the waiver of the rights of plaintiff contained in said contract" and "at no time did the defendants or either of them declare a forfeiture of any of the contracts referred to. 11. That in the month of December, 1910, the plaintiff delivered the keys of said premises unto said defendants at their request, and upon their promise to repay to plaintiff the said sum of \$1,700.00 when the said premises were sold by said defendants; and that the plaintiff was permitted to remain in possession thereafter until on or about the 25th day of January, 1913 (1911?). 12. That said defendant, Martin Casey, repeatedly promised to repay to plaintiff all monies paid by plaintiff under said contract, as soon as the said premises were sold by said defendant." The court also found that the cause of action was not barred by the provisions of either section 339, subdivision 1, or section 1668 of the Code of Civil Procedure.

Judgment was entered in favor of plaintiff for the sum of one thousand seven hundred dollars and defendants appeal from an order denying their motion for a new trial.

Appellants claim that, on November 22, 1910, thirty days after the execution of the tripartite agreement between Traynor and the parties to this suit, "plaintiff's right to the

property terminated by his own agreement," and that whatever he paid on the purchase price defendants properly retained as liquidated damages.

Respondent cites *Drew v. Pedlar*, 87 Cal. 443, [22 Am. St. Rep. 257, 25 Pac. 749], where the supreme court declared, as stated in the *syllabus*: "The stipulation in the contract that the purchase-money paid should be taken as liquidated damages for the breach of the contract by the purchaser is void under sections 1670 and 1671 of the Civil Code, it not being impracticable or at all difficult to fix the actual damage to the vendors, the measure of which is definitely fixed by section 3307 of the Civil Code as the excess of the agreed price, if any, over the value of the property to the vendors."

This is answered by appellants by citing *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713], where the case of *Drew v. Pedlar* is distinguished and it is said: "Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into." But the court also said in that case: "It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance and in which alone, the vendee in default would be entitled to a repayment of his money." It is the claim of respondent that this quotation is exactly applicable to the case at bar.

The transcript of the testimony is far from satisfactory, though probably defendants are free from blame in the matter. The plaintiff is a Chinese and testified without an interpreter. His testimony, in some respects, seems confused, but he testified that, after the sale of the property to Van Buskirk, appellant, Martin E. Casey, many times promised to pay him as soon as he received the purchase money from Van Buskirk. The witness, Traynor, said that on several occasions Casey told him "he would do right with Joe Hay" and "he would return Joe what money he had paid."

Appellant, Martin E. Casey, testified on direct examination that he agreed to pay Joe Hay one thousand eight hundred dollars if the property was sold for eight thousand dollars and "outside of that I know of no promise I have made to Joe Hay to repay any money at all." On cross-examina-

tion he said: "I don't remember making any direct promise at all. I don't remember whether I made a promise to Joe Hay in the month of February or the month of March."

We think the trial court was justified in finding: "That said defendant, Martin Casey, repeatedly promised to repay to plaintiff all moneys paid by plaintiff under said contract, as soon as the said premises were sold by said defendant," and also in finding that "at no time did the defendants or either of them declare a forfeiture of any of the contracts referred to."

Appellants claim that the testimony of plaintiff and of Traynor shows that any promise by appellant, Martin E. Casey, to repay plaintiff was made in November, 1910, but it is clear that such promises were made at a later time. Plaintiff testified: "Mr. Casey promised to pay me but he never paid me any. I asked him several times but he said the man didn't pay him yet. I had reference to Barney Van Buskirk." And Traynor testified: "I believe I talked with Mr. Casey about three days before the property was actually sold. That was why I asked him if he sold this property would he do right by Joe Hay and he said he would."

The complaint in this action was filed February 6, 1913. As the sale to Van Buskirk was made on the twenty-first day of April, 1911, the statute of limitations did not begin to run against plaintiff until that date.

The order appealed from is affirmed.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 24, 1916. Shaw, J., dissented from the order denying a hearing in the supreme court, and on July 24, 1916, filed the following opinion thereon:

SHAW, J.—I dissent from the order denying a rehearing in the supreme court. There is no support in the evidence for the finding of the trial court "that there was no consideration for the waiver of the rights of plaintiff contained in said contract," meaning the contract of October 22, 1910, between Martin E. Casey, J. Ross Traynor, and the plaintiff

Joe Hay. The contract itself shows a valuable consideration in the mutual agreements of the respective parties. (*Galagher v. Equitable G. L. Co.*, 141 Cal. 699, 707, [75 Pac. 329]; *Siddall v. Clark*, 89 Cal. 321, [26 Pac. 829].) It was a complete novation and a settlement of all previous transactions and obligations between Hay and Casey. The condition therein stated upon which the money was to be paid to Hay never happened and never can happen. The obligation is at an end. Unless it has suddenly become the law that contracts made freely and for a valuable consideration do not fix the rights of the parties under it, the decisions of the trial court, of the district court of appeal in affirming that judgment, and of this court in denying a rehearing, are erroneous.

---

[Civ. No. 1458. Second Appellate District.—May 26, 1916.]

JOHN EDWARD MORRIS, Appellant, v. JOY A. WINANS, Respondent.

**SALE ON EXECUTION—VALIDITY OF—ERROR IN DATE OF JUDGMENT.**—An execution sale of real property is not void as against a purchaser for value because the writ of execution misstated the date of the judgment, stating the date of a first judgment, which was set aside on appeal, instead of a second judgment, being in all other particulars regular and conforming to the second judgment, properly stating the amount thereof.

**ID.—AMENDMENT OF WRITS—POWER OF COURT.**—The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power; and it is also settled that, if the writ be amendable, it will be accorded the same effect with reference to acts done in execution of it, as if it had been amended.

**ID.—VALIDITY OF EXECUTION.**—If a writ of execution be merely erroneous—that is to say, voidable—a sale under it to a *bona fide* purchaser will be valid, although the execution be afterward set aside; but if the execution be irregular—that is to say, void—a sale under it, even to a *bona fide* purchaser, will also be void.

**ID.—CERTIFICATE OF SALE—VALIDITY OF.**—Where a certificate of sale by the sheriff under execution declares that he offered the property for a certain sum, although the provisions of the code regulating the matter of execution sales require the sheriff to offer the

property to the highest bidder at public auction, this will not invalidate the sale where it appears upon an examination of the whole document that there are ample recitals to the effect that the property was sold at public auction in accordance with the statute, and that the purchaser was the highest bidder.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Hancock & Lawrence, for Appellant.

Haas & Dunnigan, for Respondent.

**JAMES, J.**—Appeal from a judgment adverse to the plaintiff, and from an order denying his motion for a new trial.

The defendant was the purchaser at sheriff's sale of certain real property described in plaintiff's complaint. A certificate of sale and a deed were issued to him in due course. The plaintiff was the defendant in the action upon the judgment in which the execution was issued. The first judgment entered in that action was vacated on appeal, and upon a trial being had after reversal, the final judgment was entered, which was one for restitution of premises and costs. The judgment which was set aside on appeal was for restitution and possession of premises, and the sum of \$11.75, costs. The final judgment as entered thereafter was for the sum of one hundred dollars damages, and \$89.62, costs. Through error the writ of execution in describing the judgment upon which it was issued referred to the date of the first judgment instead of the last, but in all other particulars was regular and conformed to the second judgment, properly stating the amount thereof, etc. No motion was made to set aside the execution because of any irregularity, and the certificate of sale was issued in December, 1908. This action was commenced in October, 1910, the prayer being that the plaintiff have judgment declaring null and void the sheriff's certificate and deed.

It is claimed, first, that the execution sale was void because in the writ the date of the entry of judgment was misstated in that the date given was that of the first judgment which had

been set aside, and not of the last and final judgment in the action. If this irregularity rendered the writ entirely void, plaintiff was entitled to relief; otherwise not. If the writ was merely irregular and subject to an amendment, the plaintiff cannot attack it in this way as against the defendant, a purchaser for value. In the case of *O'Donnell v. Merguire*, 131 Cal. 527, [82 Am. St. Rep. 389, 63 Pac. 84], in considering the power of a court to amend writs, it is said: "The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power (1 Freeman on Executions, sec. 63); and it is also settled that, if the writ be amendable, it will be accorded the same effect with reference to acts done in execution of it, as if it had been amended. (1 Freeman on Executions, sec. 71b; *Hunt v. Loucks*, 38 Cal. 372, 374, [99 Am. Dec. 404].)" In *Hunt v. Loucks*, cited by the court in the last-mentioned case, we find this expression of the established rule: "That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. . . . We understand the settled rule to be that if the execution be merely *erroneous*—that is to say, *voidable*—a sale under it to a *bona fide* purchaser will be valid, although the execution be afterwards set aside; but if the execution be *irregular*—that is to say, *void*—a sale under it, even to a *bona fide* purchaser, will also be void."

In the same case the court, speaking to the question of a voidable execution as distinguished from a void one, says: "Nor if B, who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it—it may be years afterward! He has a remedy by motion to amend, or by action to recover the excess of the levy from the plaintiff in the execution, and the clerk, also; besides, with full knowledge of all defects, he has allowed the sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips, and in all fairness and justice to the latter, he must keep them closed forever" (citing cases). The execution in this case

was defective only in that the date of the entry of judgment was misstated; there was an existing valid judgment against the defendant at the time of its issuance, and the amount of that judgment was correctly stated in the writ; there was only one existing judgment and that judgment would appear by an inspection of the record, for the reference as given in the writ referred to and identified the case in which the final judgment had been entered; it was the same case in which the first judgment, entered as of the date mentioned in the execution, had been made and afterward vacated on appeal. In *Franklin v. Merida*, 50 Cal. 289, that being a case where the execution erroneously recited the date of the judgment, the court said: "Nor was there any necessity to amend the writ of execution, for though it erroneously recited that the judgment had been rendered on the first day of October, 1874, still it otherwise correctly referred to the judgment in such a manner as to identify it." *Van Cleave v. Bucher*, 79 Cal. 600, [21 Pac. 954], was a case wherein the writ of execution did not correctly state the amount of the judgment. The court there said: "If amendable, the writ was not void, but only voidable, and should have been served and returned by the sheriff. (Freeman on Executions, sec. 103; *Hibberd v. Smith*, 50 Cal. 511.)" In *Sprott v. Reid*, an Iowa case, reported in 3 G. Greene, 489, [56 Am. Dec. 549], a similar question was considered and the court declared its conclusion as follows: "The variance between the date of the judgment and the date as recited in the execution is urged as sufficient to invalidate the sale. It is true, as a general rule, that the execution must pursue and be warranted by the judgment. But the variance complained of in this instance is one that might have been amended. It is one of those irregularities which should be regarded as voidable only, and we consider it not enough to invalidate the sale in a collateral proceeding like the present. The execution so describes and identifies the judgment as to render certain the authority upon which it issued, and that was sufficient to invest the sheriff with power to sell."

As a ground for further objection, it is said that in the certificate of sale the sheriff declared that he had offered the property for the sum of \$236.55; that under the provisions of the code regulating the matter of execution sales the sheriff was required to offer the property to the highest bidder at

public auction. (Code Civ. Proc., sec. 694.) It is true that the certificate of sale issued by the sheriff did contain an expression such as that described, but upon an examination of the whole document as it is set out by copy in the transcript, we find ample recitals to the effect that the property was sold at public auction in accordance with the statute, and that Winans was the purchaser and highest bidder.

We find no error in the judgment and no sufficient reason why the order denying a new trial should be disturbed.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 24, 1916.

---

[Civ. No. 1278. Third Appellate District.—May 26, 1916.]

JOE SMITH, Appellant, v. A. M. REIS, Respondent.

ACTION TO ESTABLISH INTEREST IN STALLION—CONFLICTING EVIDENCE—

FINDINGS CONCLUSIVE.—In an action to recover one-half of the proceeds on the sale of a stallion, plaintiff claiming to have been a tenant in common with the defendant of the stallion, where the evidence is conflicting and defendant's testimony, if believed by the court, was sufficient to sustain a finding in his favor, it will not be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

E. S. Bell, for Appellant.

L. G. Harrier, and Harlow V. Greenwood, for Respondent.

ELLISON, J., *pro tem.*—The plaintiff alleges in his complaint that on a certain day he and the defendant were the owners as tenants in common of a certain stallion named.

He alleges that defendant has sold the stallion for one thousand five hundred dollars and has not accounted to him for any part thereof, and asks judgment against him for \$750.

The defendant, by his answer, denies that plaintiff ever owned any interest in the stallion and alleges that he was the sole owner thereof.

The court found that plaintiff was not, and never had been, the owner of any interest in the stallion, and made findings and judgment in favor of the defendant.

The appeal is taken solely on the ground that the evidence is insufficient to support the findings.

It appears that the plaintiff and defendant are both Portuguese, and do not express themselves clearly in our language, and hence the testimony is somewhat involved. It is gathered from the record that the plaintiff's testimony was to the effect that defendant agreed with him that if he would pay certain expenses that had been incurred in the care and keeping of the horse, amounting to some seventy dollars the horse was to be his. He paid these expenses and thereby became the owner of the horse but, subsequently, agreed with the defendant that if he would pay plaintiff \$115, the amount that had been paid out by plaintiff on account of the horse, then when the horse was sold defendant was to have one-half of the price he might be sold for.

The defendant gives an entirely different version of the whole transaction. He testifies he never sold the plaintiff any interest in the stallion; that plaintiff, as a friend, did pay certain bills due for the care and keep of the horse, but that all this was paid back to him. Without setting out his testimony, it is sufficient to say that if believed by the trial court it was entirely sufficient to justify the finding made. The court may well have considered the improbabilities of the plaintiff's statement that defendant sold him a stallion for seventy dollars, which, if not worth it, he claims was afterward sold for one thousand five hundred dollars. The trial court, in summing up the case, said: "It seems to me that Mr. Reis has made a statement that is clear. I see no reason to doubt it; and there are some things in the other statement that do not seem clear."

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1451. Third Appellate District.—May 26, 1916.]

THE PEOPLE, etc., Respondent, v. ELTON R. BAILEY  
et al., Appellants.

**QUO WARRANTO—RIGHT TO PUBLIC OFFICE—STATUTE OF LIMITATIONS.—**

A *quo warranto* proceeding prosecuted by the attorney-general for the purpose of ousting one charged with wrongfully and without authority of law exercising the powers of a public office is not simply a civil remedy, but one wherein the interests of the public are involved, and, therefore, lapse of time constitutes no bar to such a proceeding.

**ID.—JUDGMENT—SCOPE OF RELIEF.—**In such a proceeding the court is authorized by section 805 of the Code of Civil Procedure to provide not only for the removal of the defendant, but for the restoration to office of the relator.

**ID.—RIGHT TO OFFICE OF CAPTAIN OF POLICE OF SAN JOSE—LACK OF LACHES.—**In a *quo warranto* proceeding to determine the right to the office of captain of police of the city of San Jose, the relator cannot be said to be guilty of laches by reason of the lapse of time between his ouster and the bringing of the proceeding, where it is shown that in the meantime he had brought a *mandamus* proceeding to collect his salary, which was finally decided against him on appeal on the ground that before a judgment could be rendered in his favor, it would be necessary to determine his right to the office, and the present action was begun ninety days after the final disposition of such *mandamus* proceeding.

**ID.—PREVIOUS JUDGMENT IN PROHIBITION PROCEEDING—INSUFFICIENT ESTOPPEL.—**In such a proceeding a previous judgment rendered in a proceeding in prohibition to restrain the board of police and fire commissioners from trying the relator upon the charges preferred against him, is not sufficient as an estoppel to prevent the determination of the title to the office, where such former judgment simply recited that the board had passed an order reorganizing the police force, without further declaration that by reason of such reorganization the relator had been discharged from the force.

**ID.—REMOVAL OF POLICE OFFICERS—CONSTRUCTION OF CHARTER.—**The provision of the charter of the city of San Jose that a police officer can only be removed for cause, and after trial, is not in conflict with section 16 of article XX of the constitution.

**ID.—OATH OF CAPTAIN OF POLICE.—**A captain of police of the city of San Jose is a member of the police force of such city, and where he takes an oath at the time of his appointment to the force, it is not necessary that he should again take an oath upon promotion.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. John E. Richards, and W. A. Beasley, Judges.

The facts are stated in the opinion of the court.

H. L. Partridge, and Earl Lamb, for Appellants.

U. S. Webb, Attorney-General, J. C. Black, and Black & Clark, for Respondent.

ELLISON, J., *pro tem.*—This is an information in the nature of *quo warranto* against Elton R. Bailey to have it determined that the said Bailey has unlawfully intruded into and is unlawfully holding the position or office of captain of police of the city of San Jose, and that the relator, J. N. Black, is such captain of police and entitled to the possession of said office and to exercise the functions thereof. The city of San Jose, by permission of the court, filed a complaint in intervention. The judgment of the court was in favor of the relator and against the defendant Bailey and also against the intervener. The defendant Bailey has not appealed. The intervener brings this appeal from the judgment, and also from an order denying its motion for a new trial.

The general features of the case may be made to appear from the following outline: The relator, J. N. Black, in 1902, was appointed a member of the police force of the city of San Jose, and, in 1906, was advanced to the position of captain of police. July 22, 1908, the chief of police of said city filed charges against him with the board of police and fire commissioners (which will hereinafter be referred to as the board) alleging that he had violated certain provisions of the charter of the city and asked that he be removed from office. Upon the filing of these charges the board made an order purporting to suspend him from office and, at the same time, appointed the defendant Bailey to his place. Thereafter, on July 22, 1908, the relator began a suit in the superior court of Santa Clara County, against said board and the members thereof, to obtain a judgment prohibiting said board from trying him upon the charges so preferred against him. Upon the filing of the complaint the court made a temporary order restraining said board from trying the relator upon said charges "until the further order of the court," and

directed the defendants to appear on August 7, 1908, to show cause why they should not be absolutely "prohibited from any further proceedings in said matter."

On August 26, 1908, the board passed the following resolution or order: "That in order to keep within the allowance made for the maintenance of the Police Department of the City of San Jose, State of California, by the Mayor and Common Council of said City, commencing with September 1st, 1908, the members of said Police Department be a Chief of Police, two Captains of Police, one Detective, two Patrol Drivers and thirteen Patrolmen." At the same meeting D. W. Campbell, who had been one of the captains of police up to that time, was reappointed, and, in place of the relator, the defendant, E. R. Bailey, was appointed captain of police.

The defendant's answer to said complaint of the relator asking for a writ of prohibition was not filed until November 18, 1908, and in it was incorporated the above order accompanied by the allegation that by reason thereof the relator was "removed and discharged from and as a member of said police force of the city of San Jose."

Upon the trial of said prohibition suit the court entered a judgment permanently prohibiting the board from trying the petitioner (relator herein) upon said charges.

After the appointment of the defendant Bailey as captain of police, the relator began *mandamus* proceedings against the board to collect his salary as captain of police, on the theory that he had never been legally removed from such office and was still entitled to its emoluments. Judgment was rendered in his favor by the trial court, but, upon appeal, was reversed by the appellate court, and petition for hearing by the supreme court denied December 23, 1911.

This information in the nature of *quo warranto* was filed on the twenty-third day of March, 1912, and after a trial a judgment was rendered therein on the sixteenth day of July, 1913. In and by said judgment it was determined "that J. N. Black, since a time prior to July 22, 1908, has been and now is the duly appointed and qualified captain of police of the police department of the city of San Jose, and that he was illegally removed from said office by the orders of the board. . . . That the defendant, since the making of said orders, has wrongfully and unlawfully intruded into, usurped and held said office and still wrongfully and unlaw-

fully intrudes into, usurps and holds said office." That plaintiff be reinstated in said office and the defendant excluded therefrom.

From the judgment last referred to this appeal is prosecuted. Other facts will be more fully stated in the discussion of the points as they are taken up.

1. Appellant claims that the action is barred by the provisions of the statute of limitations.

In *McPhail v. People*, 160 Ill. 77, [52 Am. St. Rep. 306, 43 N. E. 382], it is said: "We do not consider this *quo warranto* proceeding, prosecuted by the state's attorney, for the purpose of ousting one charged with wrongfully and without authority of law exercising the office, jurisdiction and powers of a police magistrate, as simply a civil remedy, for the protection of private rights only. Police magistrates are public officers, that are provided for in the constitution of the state; and by that instrument the judicial powers of the state are, in part, vested in them. The office of police magistrate is one in which the state and the general public have a deep interest, and the jurisdiction attached to it is uniform with that belonging to the office of justice of the peace. It is a matter of public concern to the people of the state, and against their peace and dignity, that any one should unlawfully, and without authority of right, exercise the jurisdiction, powers and functions of such office, and also a matter of interest to the state and to the general public that more persons than the law authorizes are acting as police magistrates. In this country the rule is that the attorney general or state's attorney may file the information in behalf of the people, where the interests of the general public are involved, at any time, and that, in conformity with the maxim, '*Nullum tempus occurrit regi*,' lapse of time constitutes no bar to the proceeding." (High on Extraordinary Legal Remedies, sec. 621; *Commonwealth v. Allen*, 128 Mass. 308.)

In High on Extraordinary Legal Remedies, section 621, it is said: "In the absence of any statutory period of limitation, it is held in this country that the attorney-general may file the information in behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding."

We are of the opinion that the established rule of law, as to the statute of limitations and its bearing upon cases of this character, is correctly stated in the quotations above made and

"that the attorney general may file the information on behalf of the people *at any time*, and that lapse of time constitutes no bar to the proceeding." The law, in thus permitting the attorney-general, either upon his own information or upon the information of a private party, to file an information at any time against one who has unlawfully intruded into and is holding a public office, does not place the courts or private parties in much danger of having to deal with stale claims. The action can only be brought with the consent and permission of the attorney-general of the state, and, it is to be assumed, he will not permit the institution of such a suit, if by reason of a great lapse of time the claim has become stale, or for any other reason the state has ceased to have a present interest in it. (See *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521, [94 Am. Dec. 123]; *State v. Port of Tillamook*, 62 Or. 332, [Ann. Cas. 1914C, 483, 124 Pac. 637].)

2. The judgment in this case orders that the defendant be removed and excluded from the office, and that the relator be reinstated therein and permitted to perform its duties, and counsel for appellant, in his closing brief, says: "We wish to repeat that it is one thing to oust Bailey from office and quite a different thing to place Black therein. So far as the restoration of Black to office is concerned (leaving out of consideration for the moment the removal of Bailey), this is nothing in the world but an application for a writ of mandate. That the statute would run against this writ is unquestioned."

It was decided, in *Black v. Board of Police Commrs.*, 17 Cal. App. 310, 314, [119 Pac. 674]: "When there is an actual incumbent of an office, holding his position and exercising its functions under color of right, *mandamus* will not lie to a state auditor to compel him to audit the claim of another person for the salary of the office. In such case it is sufficient objection to relief by *mandamus* that a conflict of title is presented, which can be determined only by proceedings in *quo warranto*, and the auditor himself has no power to inquire into the regularity of the commission issued for the office, or to determine the disputed title." So, if counsel's point is well taken that so far as the restoration of Black is concerned this is nothing but an application for a writ of mandate; then he should be defeated regardless of the pleas of the statute of limitations, for it has already been decided that his right to the office cannot be adjudicated in such a proceeding.

The relief granted Black by this judgment is the relief that the code expressly provides may be granted in *quo warranto* proceedings, and the court is not prepared to hold that the action is not barred in so far as it is a proceeding to oust Bailey from the office, but that it is barred in so far as it reinstates Black therein. By section 805 of the Code of Civil Procedure it is provided: "In every such action judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require."

Until the rights of Bailey to the office had been determined adversely to his claim in *quo warranto* proceedings, Black could bring no independent action or proceeding looking solely to his restoration to it. And the legislature very wisely provided that the rights of the one thought to be holding the office unlawfully, and of the one claiming to be entitled to it, might be adjudicated in one and the same suit. As the only proceeding Black could institute to regain the office was an information in the nature of *quo warranto*, and as such action is not barred, the part of the judgment reinstating Black in the office is relief properly granted to him.

The cause of action set forth in the information not being barred, the court was not restrained, by any statute of limitations, from granting all the relief that the law expressly declares may be granted in such an action.

3. The case does not show laches on the part of the state or on the part of the relator barring relief.

Laches has been thus defined by our supreme court: "While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches import a merely passive, while acquiescence implies active, assent; and while, when there is no statutory limitation applicable to the case, courts of equity would discourage laches, and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, as they may when acquiescence has existed. Laches, in fact, amount only to that inferior species of acquiescence described in the following terms by Lord Kindersley, in *Rochdale etc. Co. v. King*, 2 Sim., N. S., 89 [61 Eng. Reprint, 270]: 'Mere acquiescence (if by acquiescence is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the right

of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations.' " (*Luz v. Haggin*, 69 Cal. 255, 270, [10 Pac. 674].)

Nothing appears in the conduct of the relator since August, 1908, that savors at all of laches as above defined. No delay is shown in asserting his rights, and the lapse of time between his attempted ouster and the bringing of this proceeding is fully and satisfactorily explained and excused. In addition to the prohibition suit above referred to he began *mandamus* proceedings to collect his salary. This proceeding was finally decided against him on the ground, distinctly stated, that, before a judgment could be rendered in his favor for his salary, it would be necessary to determine his right to the office, and that this could not be done in a *mandamus* proceeding while another was occupying the office, performing its duties and claiming the right so to do. The present action was begun within ninety days after the final disposition of the *mandamus* proceeding. The record shows that relator has at all times been actively asserting his right to the office, and, while it was finally decided that he had mistaken his remedy, it may not be said that his conduct shows "passive assent" to the conduct of the board or city or defendant and negatives all idea of unexcused delay.

The following finding of the trial court is abundantly supported by the record: "That the relator has at all times proceeded diligently to have the title to the said office and position of captain of police determined, and that all the foregoing proceedings taken on his part were of great expense to him and were all taken in good faith under the belief that he was proceeding properly to have the title to said office and position regularly determined and tried," and effectually disposes of the claim of laches.

4. The board, in its answer to the suit brought by the relator against it to obtain a writ prohibiting it from trying him upon the charges preferred against him, pleaded as a defense that since the commencement of the action it had reduced the number of the police force, and that relator herein "was, because of the reduction in the said police force, removed and discharged from and as a member of said police force of the

city of San Jose." Upon the conclusion of the trial of said action findings were waived and judgment rendered prohibiting the board from at all trying the petitioner on said charges that had been preferred against him. Said judgment contained, in the recitals thereof, the following: "Since the issuance of said interlocutory writ said board have on the 26th day of August, 1908, passed an order reorganizing the police force of the city of San Jose, and thereby estopping themselves from trying plaintiff on said charges, and on that ground. It is ordered," etc.

As to the effect of this recital and judgment: Counsel for appellant takes the position that it decides that Black was properly and legally removed from the police force by the order of August 26, 1908, and was no longer a member thereof, and that said judgment is a final determination of that question and estops the parties from investigating it in this action; while counsel for respondent claims "The judgment in the prohibition case finally and conclusively determined relator's title to the office of captain of police." Is either of these positions tenable?

A judgment rendered in another action between the same parties may, when pleaded, be viewed in two aspects: 1. As "a final determination of the rights of the parties in the action or proceeding" (Code Civ. Proc., sec. 577), and, 2. As an adjudication of certain questions that may have been put in issue, tried and decided. The judgment in this case was a final adjudication that the board had no right to and should not try the relator upon the charges that had been presented against him. We assume that it is pleaded in this action by the appellant for the purpose of showing that in the former action the mixed question of law and fact of whether respondent had been legally removed from the office was put in issue; was tried and decided against J. N. Black, the respondent in this action; that, having thus once been put in issue in an action between the same parties, the question cannot again be litigated between them.

The law upon this matter is clearly stated in *Green v. Thornton*, 130 Cal. 482, [62 Pac. 750], wherein (quoting from *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1 [42 L. Ed. 355, 18 Sup. Ct. Rep. 18]), it is said: "The general principle announced in numerous cases in this court is that

the right, question, or fact, definitely put in issue and directly determined by the court of competent jurisdiction as a ground of recovery, cannot be contested in a subsequent suit between the same parties or their privies."

Section 1911 of the Code of Civil Procedure provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Russell v. Place*, 94 U. S. 606, [24 L. Ed. 214], it is said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. If upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." "An estoppel cannot be created by mere argument." (Freeman on Judgments, sec. 258.)

With these settled principles of law before us, we proceed to analyze the situation a little more closely.

1. A finding by the court that the board had removed the relator from office was not necessary in order to render the judgment that was rendered. "It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally conclusive and indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn." (Freeman on Judgments, sec. 257.) The judg-

ment could well have been rendered on a view taken by the trial judge that the charges were insufficient in substance or in legal effect to justify a trial. It could have founded its judgment on the theory entertained by it that the affidavit filed by petitioner stated grounds for relief, and that its allegations had been established by the evidence. Hence an implied finding by the court that the defendant had been removed from office was not necessary to the judgment. If it was, then it follows that the complaint did not state facts entitling plaintiff to relief by way of a judgment of prohibition because it contained no reference to the order of August 26, 1908. Nor does the recital in the judgment show that the court determined, either expressly or impliedly, that the relator had been removed and was no longer an officer of the municipality. The judgment recites that the board, "on August 26, 1908, passed an order reorganizing the police force of the city of San Jose." This is the extent of the recital as to what was done. For the former judgment to be an estoppel upon the question as to whether the relator has been legally removed from his office, the court, in addition to the above recital, should have found that by reason of said reorganization by the board the relator has been discharged from the police force, that the acts of the board legally had that effect, and that he was no longer a member thereof. A mere recital or finding that the police force had been reorganized falls far short of a finding that the relator had been legally dismissed from the police force. In said recital the court also states that by its acts the board had estopped "themselves from trying plaintiff on said charge," and this is claimed as a final adjudication that he was no longer a member of the force.

That the court did not intend by the use of the word "estopped" to find that relator was no longer a member of the force is apparent from the whole situation, and from the judgment of prohibition that followed. The words are more in the nature of a reason advanced by the court why relator should have the judgment prayed for and which was awarded to him. "The effect of a judgment as *res adjudicata* is not limited or enlarged by the reasons given by the court for its rendition." (*Davis v. Millaudon*, 17 La. Ann. 97, [87 Am. Dec. 517].) "With the process of reasoning by which the court reached its conclusion we have nothing to do." (*In re*

*Kingsley*, 93 Cal. 576, [29 Pac. 244].) We conclude that the relator is not estopped by said judgment from prosecuting this action.

5. Counsel calls attention to section 16 of article XX of the constitution wherein it is provided that if the term of an officer is not provided for in the constitution it may be declared by law, and if not so declared he shall hold his position at the pleasure of the appointing power, and argues that if the charter did not fix the term of a captain of police by stating the definite number of years of such term (and this the charter does not do), then, under the above constitutional provision, he would hold at the pleasure of the board and it could discharge him at any time; and that the provision in the charter that he could only be removed for cause, and after trial, is in conflict with said constitutional provision.

The charter of the city of San Jose is not a law passed by the municipality. It is a law of the state, having the same force and effect as a law directly enacted by the legislature, and must be "upheld unless it is clearly shown to have been, at the time of its enactment, repugnant to and inconsistent with the then existing fundamental law." (*Stern v. City Council*, 25 Cal. App. 685, [145 Pac. 167].) When the charter of the city of San Jose became a law, subdivision 3 of section 8½ of article XI of the constitution provided that it should be competent in all charters framed under the authority of section 8, article XI, to provide "For the constitution, regulation, compensation and government . . . of the municipal police force." This language is broad enough to embrace provisions in a charter fixing the personal qualifications of the members of the police force, the time they may serve, and the manner and conditions of their removal, and, if express authority from the constitution is needed for the provision in the charter, that members of the police force can only be removed for cause and after trial, it is found in the above provision.

6. The point is made that it does not appear that relator ever had a commission issued to him "as captain of police and never subscribed or took an oath of office as such."

A captain of police is a member of the police force of the city. (Sec. 6, art. X, of the charter, Stats. 1897, p. 625.) At the time of his appointment to the police force of the city he took and subscribed the requisite oath. It was not contem-

plated that, with every change in his position on the force, by promotion or otherwise, he should again take and subscribe an oath as such member of the police force.

7. The charter of the city of San Jose provides that officers of the police force shall retain their positions during good behavior and efficiency, and shall not be removed except for cause, and provides that in any case for removal for cause there shall be a trial had after notice. Additionally to show that the relator could only be removed after a trial had and an order of removal made, we quote the following from the opinion in *Bannerman v. Boyle*, 160 Cal. 205: "The doctrine that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removal for cause, or for a definite term, subject to be removed for cause, may be regarded as settled law in this country." It is conceded that the relator was never thus removed.

8. The order of suspension made upon the filing of the charges against the relator was only temporary in character, and its force and effect ended with the final judgment of the court prohibiting the board from trying him thereon.

9. As to his removal from office by virtue of the purported order of the board reducing the number of the police force, the court, upon abundant evidence, made the following finding: "That the aforesaid action of the board and the adoption of the aforesaid orders and resolutions were all wholly in bad faith and solely for the purpose of ousting the relator from his said office and position and depriving him thereof without a hearing or trial of any kind and for the purpose of giving to Elton R. Bailey the office and position of the relator." That said orders were not a reorganization in any particular, so far as covered captains of police; that it intended all the time that the department should consist of two captains of police with precisely the same duties of office that theretofore existed, and such orders did not change or modify the office of captain of police, but were made for the purpose of evading and avoiding the requirements of the charter, which accorded to relator the right to hold his office until accusations were made against him and regularly tried.

As the findings of the court are supported by the evidence, the judgment by the findings, and as no reversible error ap-

pears in the record, it follows that the judgment and order should be and they are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 25, 1916.

---

[Civ. No. 1978. Second Appellate District.—May 27, 1916.]

LEO B. GASKILL, Administrator of the Estate of Albert Kolb, Deceased, Appellant, v. PACIFIC ELECTRIC RAILWAY COMPANY (a Corporation), Respondent.

**NEGLIGENCE—ATTEMPT TO BOARD MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.**—One who attempts to board an electric car while it is moving at the rate of nine to ten miles per hour, is guilty of contributory negligence which will defeat a recovery of damages for injuries received by him, even though the defendant is guilty of negligence in the operation of the train.

**ID.—RIGHT OF COURT TO TAKE CASE FROM JURY.**—The court is authorized to take the case from the jury when, upon the whole evidence, were a verdict returned in favor of the plaintiff, the court would feel impelled to set it aside as unsupported by the evidence.

**ID.—MOTION FOR NEW TRIAL—INSUFFICIENT SHOWING.**—It is held that the affidavits presented on the motion for a new trial in this case were insufficient to warrant the granting of the motion.

**ID.—DIRECTED VERDICT—VIEWS OF JURY IMMATERIAL.**—Where the court directs the verdict of the jury it is immaterial whether the jurors agree with the court or not.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George D. Murray, Judge presiding.

The facts are stated in the opinion of the court.

M. O. Graves, for Appellant.

J. W. McKinley, and A. W. Ashburn, Jr., for Respondent.

**JAMES, J.**—Plaintiff, as the administrator of the estate of Albert Kolb, deceased, brought this action to recover damages on account of the death of said Kolb, alleged to have been caused by the negligent acts of the defendant corporation. At the conclusion of all of the testimony the trial judge directed a verdict to be returned for the defendant. The judgment, which in effect was that of a nonsuit, was thereupon entered. Subsequently plaintiff made a motion for a new trial, which was denied. This appeal was then taken from the judgment as entered and from the order denying the motion mentioned. The appeal is presented on a statement of the case.

In September, 1911, defendant as a railway corporation was engaged in operating between the city of Los Angeles and the towns of Santa Monica, Ocean Park, and Venice, an electric railroad which was used mainly for the carriage of passengers. On a day about the date mentioned, Albert Kolb, the deceased, in company with a friend named Peter Dombroska, journeyed to the beach town of Ocean Park, where the two men spent the greater part of the day. At about 12 o'clock at night they appeared at one of the stopping-places provided by the railroad company at Ocean Park, where they waited for a train to take them back to the city. The men had been drinking intoxicating liquor during the day and evening. At the point where the stopping-place referred to was located there was a double-track railway construction over which the electric cars passed, and which tracks, proceeding from the north toward the station of Venice to the south, cut at right angles, or approximately thereto, various streets which intersected the right of way and defined the blocks of land upon which numerous buildings were built. At a point about sixty feet below or southerly from the intersection of Pier Avenue with the trolley-way, was located a sign attached to a post, which bore the legend, "All Cars Stop Here." In considering the action of the court in refusing to submit the issues defined by the pleadings to the jury, the testimony of Dombroska, the friend of deceased, may be taken as furnishing the most favorable evidence offered in the attempt to sustain the cause of action alleged. It may be remarked that as to many of the material matters testified to by this witness there was contradictory testimony given on behalf of the defendant. Dombroska testified that he and his friend Kolb had gone to the beach for a day of pleasure. He testified that they had pa-

tronzized the saloons quite liberally, but he stated that neither he nor his friend at 12 o'clock that night was in a state of intoxication. He testified that Kolb drank "one whisky" in the forenoon, and two glasses of beer in the afternoon, while he (Dombroska) had two drinks of whisky in the morning and "a dozen or thirteen beers" in the afternoon; that they purchased a pint bottle of whisky before they went to the stopping-place where they intended to take the cars for Los Angeles. At the time they arrived at this place it was about 12 o'clock. After going to a neighboring lunch counter and partaking of food, they returned to the railway line and waited for a train. A police officer testified later in the case that he had observed the two men when they first came up and that they were intoxicated; that they asked him when the last car would leave for Los Angeles and he told them at 12:07; that they then inquired where they could get lunch and he pointed out a lunch counter to them, which they entered; that they did not leave the lunch stand until after the last train had gone, and when they came out he told them that their train had gone, and that the train which was approaching was not going to Los Angeles. Dombroska in his testimony said, referring to this conversation with the policeman: "I don't remember whether he told me that that car was not going to Los Angeles, that the last car had gone to Los Angeles. I have had a conversation with him, but I don't know if I spoke to him about any car, what time she was going to leave." This statement by Dombroska may be taken as an admission of the truth of what the officer testified to regarding the inquiries made of him by the two men, and of his responses thereto. Dombroska testified that he and Kolb saw a train approaching from the north consisting of several cars—the fact was shown by other testimony without dispute that it was a four-car train—and that on the front of the train was a sign bearing the words "Los Angeles"; that the train as it approached the point marked as the stopping-place by the sign on the post, slowed down to nine or ten miles an hour; that pursuant to an understanding between him and his friend he attempted to get on the front platform of the first car, while Kolb made a like attempt on the second platform of the same car. Dombroska testified that he got on safely and observed that the car had increased its speed with a jerk, at which moment he observed his friend Kolb fall.

The train continued without stopping until a switch was reached, where Dombroska alighted and returned to the place where Kolb had attempted to board the train, and found that he had been badly injured, his legs having been cut off by the wheels of the car and from which injuries he later died. The operatives of the train testified that the train was out of service at the time of the accident, on its way to the car barns, and that the only sign displayed was a sign reading, "Take Next Car"; that one of the conductors stood upon the front platform and, as the train passed the stopping place at Pier Avenue, motioned toward the sign to the several people who were standing there, and at the same time called out that the train was "out of service." It would seem also from the whole of the testimony, a portion of which only is referred to, that both Kolb and Dombroska were intoxicated. However, even giving full credit to the strongest testimony introduced by the plaintiff, to wit, that of Dombroska, and leaving out of consideration all testimony which conflicts therewith, we are of the opinion that from that evidence no reasonable deduction can be drawn which tends to establish the charge that the defendant was negligent; and if we assume that the evidence tends to show a negligent act in the operation of the train, then, without any question in our minds at all, by Dombroska's own statements, the men were guilty of contributory negligence in attempting to board a train of cars moving, as Dombroska said, at the rate of from nine to ten miles per hour. It must be taken as a fact, for Dombroska did not deny the statement of the police-officer witness, that he and Kolb were told by the officer that the last train for Los Angeles had gone, and that the approaching train was not one bound for that city. If the train was one upon which it was intended that passengers should be received at that point, Kolb and Dombroska knew that all they had to do was to wait until it had come safely to a stop before attempting to get aboard. They chose rather to take the risk attending the act of getting aboard the rapidly moving cars, and the resultant injury was one which must be directly attributed to their heedless and negligent conduct. It has been repeatedly held that the court is authorized to take the case from the jury when, upon the whole evidence were a verdict returned in favor of a plaintiff, the court would have felt impelled to set it aside as unsupported by the evidence. The cases are collected and cited in

the *Matter of the Estate of Baldwin*, 162 Cal. 472, [123 Pac. 267].

Upon the motion for a new trial three affidavits were offered, the first one referring to the testimony of the witness Jessica Maloney. This person it appears did not testify as counsel for the plaintiff had understood that she would testify, and the affidavit only showed she had made statements inconsistent with her testimony given at the trial. There was nothing in the facts stated in this affidavit which established any good cause for the granting of the motion. The second affidavit was made by counsel in the case, who averred in general terms that he had discovered evidence which would establish the fact that the train at the time of the accident stopped and then jerked and threw Kolb under the cars. There is no statement in this affidavit as to what particular evidence the counsel could procure upon that point. The third affidavit was made by Charlotte Jackson, who deposed that she was at the place of the accident on the night in question and that she stopped near the sign (which was referred to in Dombroska's testimony); that when the two men started to get aboard, the cars made a short stop and immediately jerked and went on; that the jerk of the car threw the younger man backward and he was run over by the second car. She further deposed that she did not know that any suit was pending until she read an account of the trial in a Los Angeles newspaper, and that she then communicated her knowledge of the case to the attorney for the plaintiff; that the reason she did not appear and give testimony was that she did not know of the suit and was not summoned in the case. It does not appear whether the affiant communicated her knowledge of the case to the counsel before the close of the trial or afterward. For aught that appears by her statements, she communicated immediately upon reading of the trial in a newspaper, and we cannot surmise whether the trial was in progress at that time or had ended. No other showing was made on the part of plaintiff or his counsel as to why this witness was not produced at the trial.

The point is made that after the jury was instructed to return a verdict for the defendant, the verdict was so returned; upon a poll being taken of the jurors, six answered affirming the verdict as returned and six answered that it was not their verdict. The record shows that the court presented a form of

verdict to the jury and directed the foreman to sign the same without the jury leaving the box, and that the verdict was so returned. The effect of the judgment is that of a nonsuit, which might have been entered without any direction requiring the jury to return any verdict in the case. Such being the result, it would seem immaterial whether the jurors agreed with the court or not, as any view held by them in opposition to that held by the court could not be allowed to prevail.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 24, 1916.

---

[Civ. No. 1512. Third Appellate District.—May 27, 1916.]

**ESTELLA PORTERFIELD et al., Respondents, v. THE CITY OF MODESTO, Appellant.**

**NEGLIGENCE—DEATH OF LABORER IN SEWER TRENCH—DANGEROUS PLACE TO WORK—LACK OF WARNING—LIABILITY OF MUNICIPALITY.**—A municipal corporation is liable in damages for the death of a laborer resulting from injuries received while working in a sewer trench being constructed by such corporation, where he was ordered by the agent of the corporation to go into the trench and shovel dirt around a manhole being therein constructed after the bracing and cribbing at the place where he was directed to work had been previously removed, leaving the walls of the trench without support, and no special warning given him of the danger from caving in of the excavation.

**APPEAL** from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge.

The facts are stated in the opinion of the court.

E. R. Jones, and L. J. Maddux, for Appellant.

J. W. Hawkins, for Respondents.

CHIPMAN, P. J.—This is an action brought by plaintiffs, Estella and Agnes Porterfield, to recover damages for the death of Charles Porterfield, the husband and father, respectively, of plaintiffs. Porterfield's death resulted from injuries received while working as a laborer in a sewer trench being constructed by the city of Modesto. The councilmen of the city were made parties defendant, but, by consent of plaintiffs' counsel, the court instructed the jury that if they found for the plaintiffs the verdict should be against the city of Modesto only. The case was tried by the superior court with a jury, and a verdict was rendered in favor of plaintiffs for the sum of seven thousand five hundred dollars. Based upon the verdict, a judgment was entered for said sum in favor of plaintiffs, from which defendant has appealed under the alternative method.

The record is singularly free from any claim of errors of the court in conducting the trial. The instructions were clear and succinct statements of the law necessary for the guidance of the jury and are in nowise challenged. The nature and extent of the grounds for the appeal will be found in the following statement in defendant's brief: "The theory of the defense at the trial of said action and on this appeal is that the injuries received by said Charles Porterfield, and which resulted in his death, were received not in the line of his duty, but were caused by his gross carelessness in disobeying the orders of his superior, G. H. Freitas (city engineer in charge of the work); and also that the verdict is contrary to the evidence, for the reason that there was an utter failure on the part of the plaintiffs to establish the negligence alleged in the complaint." In short, the defense was contributory negligence by the deceased.

It was alleged in the complaint that the said construction work was in charge of said engineer, Freitas, pursuant to the resolution of defendant; that, on October 9, 1913, a portion of the excavation or trench for the sewer pipe had been opened up for some distance and the sewer pipe laid therein and the trench ordered by the city to be closed; that the soil through which the trench was dug was of such nature that to prevent its caving and falling upon laborers working in the trench it was necessary that the sides of the trench should be secured by cribbing, in the absence of which it was a dangerous and unsafe place to work, a fact well known to defendants; that,

notwithstanding such fact and such knowledge by defendants, Porterfield was ordered by defendants to go into the trench and shovel dirt around a manhole being therein constructed; that the bracings or cribbing at the place where Porterfield was directed to work had previously been removed, thus leaving the walls of the trench without support and liable to cave in and fall upon him when he was at work; that it was unnecessary to send him into the trench for the purpose above stated for the reason that, as had elsewhere been done in filling the trench, earth which had been thrown out of the trench and lying along the sides at the top could have been used for the purpose of filling around the manhole; "that while the said Charles Porterfield was carrying out the instructions of the defendants, and was in said trench for the purpose of shoveling said dirt around said manhole, the said bank of said ditch caved in and upon the said Charles Porterfield and crushed his head, and the said Charles Porterfield did, on the 10th day of October, 1913, die as a result of said injury"; that defendant did not provide said Porterfield a reasonably safe place in which to work, "in that said defendant did not keep said ditch cribbed and braced. That said defendant sent said Charles Porterfield into a place unsafe to work in with full knowledge of the dangerous condition of said place." With much amplification the complaint sets forth the facts of which the foregoing is a brief summary.

The testimony was that the trench had been closed up to a point near to and east of the manhole, and had also been filled west of the manhole within about six or seven feet of the top. The manhole was in course of construction and was completed to a point a few feet from the top. The following description of the manner in which the work was done is taken from respondents' brief and is in accordance with the testimony:

"According to the testimony of all the witnesses the soil in the city of Modesto where the sewer was being constructed had on top a strata of hard material, and underlying this was loose running sand. The cave-in was on F street, between Fifth and Sixth streets. As the excavation was opened up cribbing was placed in the excavation to keep the ground from caving in. The first row of cribbing extended down ten feet and was composed of upright boards placed on both sides of the excavation and held apart by jacks. The second row of cribbing extended down the rest of the distance and was

constructed for the same purpose and in the same manner as the first row of cribbing. Always, prior to the death of Porterfield, it was customary for the excavation to be filled before removing the cribbing. The filling-in was done in the following manner: Dirt was filled in until it reached the first row of jacks, then the lowest row of jacks was removed and dirt filled up to second row of jacks, which were then taken out and the filling-in progressed as before until the excavation had been filled up to the top of the lower row of cribbing. Then the lower row of cribbing was pulled out by means of chains and jack screws, the upper row of cribbing still remaining in place. The lower row of jacks on the upper row of cribbing was then removed, and the filling progressed as before, each row of jacks being removed as the dirt in the excavation was filled until the whole excavation was filled. Thereupon the upper row of cribbing was removed by pulling out the upright boards with chain and jack.

"When Porterfield was killed the cribbing had all been removed but the excavation had not been filled up, and the workmen had placed cribbing at one point only in the excavation and that was right at the manhole, the excavation being cribbed for the distance of six feet directly opposite the place where the manhole was being constructed. The banks of the excavation west of the manhole had cracked but had not fallen into the excavation. The engineer in charge of the work knew of this fact. Always, prior to the time Porterfield was killed, the excavation had been filled from the top and at the time Porterfield was killed there was plenty of dirt on top of the ground and adjacent to the excavation to fill up the excavation. This dirt was the same dirt that had come from the excavation. Engineer Freitas was in charge of the work for the city of Modesto. The sewer pipe had been laid in the trench and a manhole was being constructed. The manhole was being constructed with brick and was circular in form. As the masons laid the brick it was necessary to fill in dirt around the manhole to give the masons a place to stand on."

The following statement of respondents' counsel presents the only controverted question of importance in the case: "Some jacks and timbers had been left in the excavation around and near the manhole and Engineer Freitas told Porterfield to go down into the trench and throw out the

jacks and timbers and fill in around the manhole for the purpose of giving the masons a footing on which to work. Porterfield went down into the trench on the west side of the manhole to carry out the orders given him and the cracked bank of the excavation fell in upon Porterfield and killed him."

There is no substantial conflict in the evidence except as to the instructions given to Porterfield in obedience to which he went into the trench, and upon this point the only direct testimony was given by witness G. W. Bowman, a laborer at work at the manhole, and the testimony of George H. Freitas, the engineer in charge. Bowman testified that he was working at the manhole mentioned in the evidence and was asked if he heard Engineer Freitas say anything to Porterfield the afternoon the latter was hurt. "A. Well, he told him to go down in the ditch and clean up and fill in around the manhole. Q. Do you know whether he went down into the ditch or not? A. Yes, sir; he went down. Q. What did he do when he went down there, if you know? A. Well, he taken some jacks and timbers—2x6's and 2x8's out and put them up on the bank. Q. They were lying loose on the ground in there? A. Yes, sir. They had taken out from around the manhole and threwed them back, and he put them on the bank. Q. He put them upon the bank? A. Yes. Q. Now, what happened? A. Well, I don't know just how long he had been in there but it hadn't been but a short time until he got caught—got crushed. He hadn't been very long however. Q. How did he get crushed? A. Well, he was—it seems as though he was standing leaning up against the north bank and a chunk of dirt came from the south and caught him. Q. Anyway, he was pinned against the north bank? A. Yes. Q. By a chunk of dirt? A. Yes, sir. Q. How big a chunk was that? A. Oh, I don't know; I guess it would weigh 1,800 or 2,000 or something like that. Q. You were there and saw him pinned? A. No, I didn't see him; I seen him a few seconds afterward. I was up at the mortar box, a little ways. I don't know, fifteen or twenty feet. Q. What did you do? A. Well, Mr. Freitas and I and Mr. Mueller—Phil Mueller—went down in there and tried to move it and could not do it and I taken a pick and broke the top of it off and we pulled him out and laid him out on the bank. . . . Q. Now, had you seen the ground there prior to this time—before he got hurt?

A. Yes, sir. Q. What was the condition of it before? A. Well, after the sand tumbled from under it you know there was a great long slide of it cracked away back and came out to a peak up here you know where that chunk broke off; you see after we taken the timbers out it cracked out aways from the edge of the ditch, you know; just had been hanging there, I don't know, a couple of weeks or maybe something like that." He testified that anyone going along this ditch could see this crack, and that Mr. Freitas was up and down along the ditch frequently every day. He testified, and other witnesses testified to the fact, that the top earth for a few feet down was compact, but below the formation was almost pure sand and had to be cribbed to hold it in place; that the sewer was about sixteen or seventeen feet deep and had been filled up at the manhole within six or eight feet of the top; that there was dirt a few feet from the edge of the ditch which had been thrown out in digging it. It appeared that about twenty-five or thirty feet west of the manhole the trench had been filled up within three or three and one-half feet of the top. On cross-examination the witness testified that Porterfield went into the ditch at this point. It further appeared that the earth, in filling at this point, assumed a slope down toward the manhole to a point ten or twelve feet from the manhole. The witness testified that it was after he had seen Porterfield go into the ditch that he "saw him throwing out jacks and timbers. . . . He went in there where it was shallow and went down in there where it was deeper you see toward the manhole to clean up. Q. Yes; you say Mr. Freitas told him to do that? A. Yes, sir. Q. Did you hear Mr. Freitas say it? A. Yes. . . . Q. Well, had he taken out all the timbers and jack-screws? A. Yes. He had taken them all out and commenced to shovel the dirt down." He testified: "When I got there you see to help to get him out a chunk of dirt had caught him and he was standing right against the north wall and the chunk came from the south. . . . His shovel was sitting there when the chunk of dirt caught him, sitting up by his side like." On further cross-examination he testified, in answer to a question whether he saw Porterfield in the ditch: "No, I didn't see him in the ditch; only when I was carrying mortar up—you see I carried mortar from the box up to the manhole and dumped it and I just got dumped out a pail-full and came back and seen him in there. Q. I say, you did not

see Porterfield in the ditch before he was injured? A. Yes. Q. You say you did see him in the ditch? A. Yes." After the accident Porterfield was found in an upright position with his back against the north wall of the trench and ten or eleven feet from the manhole. The "chunk" of earth mentioned by the witness came from the south side where the crack was.

Engineer Freitas testified that he had full charge of the work on the sewer, and that Porterfield was working with pick and shovel under his direction; that, in the afternoon, about 4:30 o'clock, he directed Porterfield to assist in hauling some brick to the manhole referred to in the testimony. "Q. Just state what you told him to do. A. Well, I told Mr. Porterfield that when he got through that brick work—hauling the brick, that he was to assist the men around the manhole by back-filling or shoveling dirt back against the manhole. Q. Where did you intend or tell him to stand in doing the work, in the ditch or on the ditch? A. I directed that he should stand in the ditch. . . . Q. What did you tell him? A. I told Mr. Porterfield to fill in from a point where the trench was shallowest, and indicated the point where I wanted him to work. Q. Where did you indicate to him? A. I indicated a point down along about between where it is three and a half feet deep and three feet deep in the diagram (indicating)." He testified that the sewer at that point was sixteen feet deep, but it had been partly filled and was between three and three and a half feet at the point indicated and sloped down to the manhole where it was about eight feet deep; that he sent Porterfield into the ditch to fill out the time until 5 o'clock, quitting time; that the ditch was forty-four inches wide; that the distance from the point where he testified he directed Porterfield to stand to the center of the manhole was twenty-seven and one-half feet; that the crack in the earth, mentioned by witnesses, commenced about where Porterfield was to stand (a photograph was introduced showing the surface and the ditch in that vicinity). "The back filling was generally done from the top. That was the regular way of doing. Q. What was the object of having it done from this trench on this special occasion? A. Why, at that time the men were working around the manhole—the brickmen and their assistants, and it wasn't possible to throw the dirt from the top over the top of these men; it would interfere with their work. Q. Well, I believe you said it was

done for the purpose of filling in a few moments of extra time. A. That is all, just had the time to fill in from that until 5 o'clock, just simply to keep him busy." He also stated that another reason was to avoid making a dust to the annoyance of the brick masons. . . .

"Q. Do you know whether or not the deceased Charles Porterfield went to work at the point? A. I do not. Q. Did you see him in the trench at all? A. Not until after the accident happened and I helped to take him out." He testified that Porterfield was found at a point about sixteen feet from where witness directed him to go to work; that he saw no shovel where Porterfield was found; that there was no necessity for his going there in the line of his duty. "Q. What did you say to Charles Porterfield, if anything, about going into dangerous places? A. Well, I don't know that I ever spoke to him directly. I spoke to the men generally—gave them instructions to always be careful and to be sure wherever they were working that everything was safe and secure." He was asked if Porterfield was present when he gave such instructions and answered: "I believe he was." He testified that at the point where Porterfield was hurt the cribbing had been removed, and that there had been cribbing there, and nothing remained to be done but to fill the ditch except the work at the manhole. A photograph was introduced representing a man standing in the trench where the witness testified Porterfield was killed, which, he testified, was eleven feet from the manhole. Several photographs were introduced to assist the jury in understanding the testimony, but we do not think it necessary to incorporate them in this opinion. On cross-examination the witness was again asked what he said to Porterfield and answered as before: "I told him I wanted the dirt filled from the point—the shallowest point—low point where the back fill had been made to within three and a half to three feet of the top of the ground. Q. Well, did you say all that? A. I don't know that I did. I told him there is the point that I wanted the dirt from. Q. Did you go over opposite or standing where you were? A. Standing where I was standing. . . . Q. All right. Did you say anything more? A. I did not. . . . I was right at the manhole at the time, where they were building the manhole. The top is about 26 inches in diameter and 8 feet down, about three feet. . . . The brick was done to about 8 feet of the bottom."

He testified that the conditions were such as to justify him in taking out the cribbing "except right around the manhole. Q. Well, there was a big crack there that came after taking it out, wasn't there? A. That occurred after the cribbing was removed. Q. Yes. You saw that crack before the accident happened, didn't you? A. I did. I knew it was there. . . . Q. Now, if you had left the cribbing in there you could have filled in around the manhole just the same, couldn't you? A. I could have, yes." Referring to Porterfield when found, he was asked: "And in what position was he? A. He was standing. Q. He was standing up? A. Yes. Q. And the lump of dirt had apparently just tipped over like that and caught him? A. Yes." He testified that there had been other "cave-ins" during the construction of the work prior to this time. . . . "Q. When you placed Mr. Porterfield at the point where you say you told him to go, did you tell him that to go down further would be dangerous? A. I don't think I did." He testified that after the ditch had been partly filled there was danger of its breaking back. He also testified that when the men were opening the trench at first "they generally throw it pretty well back off the street and generally get it back to the curb line, which would be about twenty-five feet from the center line of the street."

Appellant's contention is that the verdict of the jury must necessarily have been formed upon the testimony of these two witnesses. "We contend," says the brief, "that when the jurors rejected the direct and positive testimony of Mr. G. H. Freitas, and brought in a verdict based upon the testimony of Bowman, that they were acting under passion and prejudice and were carried away by sympathy for the young widow and her child." And we are admonished to read carefully the testimony with the assurance that "it must be evident from the answers given by Bowman, especially on his cross-examination, that he was trying to build up a case for the plaintiffs." We have endeavored to comply with this admonition. It is true that Bowman's testimony at the trial did not harmonize in all respects with his testimony at the coroner's inquest; also that he testified at the trial to some important facts not brought out at the inquest. Experience shows that these features are not unusual. In preliminary inquiries, especially in coroner's inquests involving no element of crime, it is seldom found necessary to enter into a minute examina-

tion of all the facts. At any rate, the duty of sifting out the truth and determining the credence to be given to testimony given by witnesses is so peculiarly the function of the jury that the reviewing court cannot interfere with their conclusion unless, as is claimed here, it can safely be said that such conclusion was the result of passion and prejudice controlling the minds of the jurors. We do not feel warranted in holding that the verdict was reached under any such influence.

There was evidence justifying the jury in finding that Porterfield was directed by the engineer in charge to work at a place in the trench admittedly known by the engineer to be dangerous. That it was dangerous appeared from the fact that shortly after he had commenced work Porterfield was killed, and was killed by the caving in of a block of earth which had for some days given evidence of its liability to fall into the trench. Whether Porterfield knew of the danger, or to what extent he appreciated it, we do not know. As the cracking of the earth at the point where he was killed was known to Bowman, his fellow-laborer at the manhole, it is fair to assume that Porterfield had observed it, but we cannot assume, when told to go into the trench by one who had the authority to direct the work, that he appreciated the danger and recklessly exposed himself to the consequences and the risks attendant upon the performance of the orders given him. Indeed, we do not understand appellant to claim this. Its claim is that he was told to work at a point in the trench where, in fact, there was no danger, and that he voluntarily and needlessly assumed a position of peril, and hence plaintiff cannot recover. But appellant overlooks or entirely rejects the testimony that deceased was told to go to work at the very point where he was killed.

If we could unhesitatingly accept appellant's view of the evidence we might accept its construction of the Employers' Liability Act of 1911 (Stats. 1911, p. 796), namely, that while the statute has abolished the doctrine of assumption of risk and "while the employer must furnish his employees with safety appliances and safe places to work, that, nevertheless, the moment the employee, without so being required by his duties and not acting under orders of his employer, leaves that safe place and goes off on private excursions of his own to other parts of the work, he becomes nothing more than a trespasser so far as any liability for injuries received by him

is concerned. We do not understand it to have been the intention of the law makers, in abolishing assumption of risk, to have intended to make the employer liable regardless of how or when the employee is injured." This may be a reasonable view of the statute where the facts furnish a proper basis for it. The trouble with accepting it in the present case is that it rests upon an assumed state of facts which the jury, within their powers, manifestly rejected. Upon the facts which the jury were authorized to accept, it seems to us that there was culpable negligence in sending the deceased to work in a place concededly dangerous, and especially was it negligence to do so without specifically warning deceased of the danger. The only warning given deceased was of a general nature at other times, if any was given, on one other occasion, as appeared, when the men were taking out some cribbing. Freitas was better able to judge of the danger than was deceased, and the latter might well have assumed the work he was told to do was not imminently dangerous or his superior would not have directed him to go there. The law governing such a situation is too well known to call for citation of authorities.

The learned trial judge gave instructions upon the subject, to which no objection is now made, quite as favorable to defendant as the case would admit of, and it seems to us in taking them as their guide the jury were supported in their verdict by the evidence.

The judgment is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

---

[Civ. No. 2089. Second Appellate District.—May 31, 1916.]

WALTER PORTER, Petitioner, v. SUPERIOR COURT OF  
THE COUNTY OF LOS ANGELES et al., Respondents.

ACTION FOR DIVORCE—SERVICE OF SUMMONS BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT.—An affidavit for publication of summons in a suit for divorce which plainly and directly states that the defendant never has been a resident of the state of California, that she has never resided within the state, and that her home and resi-

dence is in Lynn, Massachusetts, the particular street number being given, is sufficient, *prima facie*, to support a valid order of publication, under section 412 of the Code of Civil Procedure, notwithstanding it does not follow a rule of the superior court requiring the affiant to give the information upon which the statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit.

APPLICATION originally made to the District Court of Appeal for the Second Appellate District for a Writ of Mandate to compel the Superior Court of Los Angeles County to reset a cause for trial.

The facts are stated in the opinion of the court.

Lewis Cruickshank, for Petitioner.

JAMES, J.—Petition for mandate. From the facts stated in the petition it appears that the petitioner herein, in August, 1915, filed a complaint in the superior court of Los Angeles County by which action a decree of divorce was sought. After summons had been issued and returned by the sheriff without service, an affidavit was made and filed by the plaintiff, upon which affidavit the court, by the Honorable Lewis R. Works, made its order directing service of summons to be made by publication. As grounds for the order the affidavit set out that the last-known residence and address of the defendant was at "69 Lakeview Avenue, Lynn, Massachusetts; that defendant at all times since the commencement of this action and for some time prior thereto was and is now an actual *bona fide* resident of the State of Massachusetts; that defendant is not now nor has she ever been, a resident of the State of California, nor has she ever resided in said State of California; affiant knows that a search anywhere in said county or state would be of no avail; . . . that the home of the defendant at the time of the commencement of this action and for some time prior thereto was 69 Lakeview Avenue, Lynn, Massachusetts; that she was the owner of said property and made her home therein." It is recited that the publication of summons was duly made, and that a copy of the summons and complaint, as required by the order of court, was deposited in the United States mail as registered matter, and was on the second day of September, 1915, actually de-

livered personally to the defendant in the divorce action; that the proof of publication of summons was regularly made and filed and default entered; that thereafter the case was duly and regularly set for trial, to be heard on the fifteenth day of February, 1916, before the Honorable J. P. Wood, judge of said court; that at the time the case came on for hearing, the court, "deciding on his own motion" that the affidavit for the order for publication of summons was insufficient, struck the cause from the calendar; that the following minute order was thereupon made: "It is hereby ordered that default of defendant be set aside and that another affidavit for publication of summons be filed, and further that the summons be republished and cause off calendar to be reset." It is as to the authority of the court to make the last order mentioned that question is made by the petition filed herein. It may be noted that the order as set out does not purport to vacate the order made directing that summons be served by publication, but only that the default of the defendant be set aside. It does appear to direct that another affidavit for publication of summons be filed and the summons republished; but so far as the record presented shows, the order made by the first-named judge authorizing the service of summons by publication, still exists and has never been modified or changed. But evidently this order was intended to have the effect of setting aside the order as made by Judge Works, and it seems to be assumed in this proceeding that it may be treated as of such effect. The return made herein does not call into question the verity of any of the material facts set out by the petitioner, but there is attached to the return a copy of the rules of the superior court. Our attention is particularly directed to rule XXVIII of that court, which provides that in any application for an order to publish summons, if the residence (of the defendant) is known and stated in the affidavit, "the affiant must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." Section 412 of the Code of Civil Procedure provides that service of summons may be made by publication "where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; . . ." In order to authorize the making of the order, such facts as

are relied upon must be established to the satisfaction of the court. If the affidavit presents facts sufficient to establish either of the conditions specified in section 412 of the Code of Civil Procedure, and the court acts thereon, granting the order, such order will be good and valid, notwithstanding that the court in its discretion might have, before making such order, required further proof to be made. The affidavit in this case plainly and directly stated that the defendant never had been a resident of the state of California, that she never had resided in the state, and that her home and residence was in Lynn, Massachusetts, the particular street number being given. These statements were sufficient *prima facie* to support a valid order of publication. (*McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, [130 Pac. 865].) The important thing was to prove to the satisfaction of the judge making the order for publication that the defendant did not reside within the state. All that the rule of the superior court to which our attention has been called requires is that in making proof of the facts as to the residence of an absent defendant, the affidavit "must also give the information upon which such statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit." If the allegations of the affidavit were sufficient to warrant the conclusion that the fact was that the defendant resided out of the state at the time of the application, regardless of whether the rule of the superior court had been strictly followed or not, the order for publication of summons would be fully authorized under the section of the code we have mentioned. There is no doubt of the right of a judge to vacate an order for publication of summons where, upon examination of the affidavit, he finds a total lack of a statement of facts sufficient to authorize the order to be made in the first instance; and we may say further that such right might exist where it appeared that the affidavit was fraudulent. No such ground as the last mentioned is suggested here. The fact that a different judge than the one who made the first order acted in attempting to set it aside, is of no moment. The second-named judge would have no greater authority—and no less—than the judge who first examined the affidavit and passed upon its sufficiency. We think that the petitioner is entitled to the relief asked for.

It is ordered that a peremptory writ of mandate issue requiring the respondent court to reset the cause on the trial calendar and hear the same within such reasonable time as may be convenient, considering the business of the court. Petitioner to recover his costs herein incurred.

Conrey, P. J., and Shaw, J., concurred.

---

[Civ. No. 1880. First Appellate District.—June 1, 1916.]

**IONE IMOGENE DE LIERE**, Respondent, v. **GOLDBERG, BOWEN & CO.** (a Corporation), Appellant.

**NEGLIGENCE—PERSONAL INJURIES—IMPANELMENT OF JURY—REFERENCE TO INSURANCE OF DEFENDANT AGAINST LOSS—CONDUCT NOT PREJUDICIAL—SUBSEQUENT EVIDENCE OF FACT.**—In an action for damages for personal injuries, the defendant is not prejudiced by the conduct of counsel for the plaintiff during the proceedings for the impanelment of the jury in getting before them the fact that the defendant was indemnified against loss by a surety company, where during a later stage of the trial the fact was permitted to go before the jury in the form of evidence without objection from one of the defendant's own witnesses.

**ID.—DAMAGES—LOSS OF MONEY PAID ON LOT.**—In an action for damages for personal injuries, the plaintiff cannot recover as special damages the amount of the installments paid by her on a piece of real property, which she had lost by reason of her inability to keep up the payments in consequence of such injuries.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Franklin A. Griffin, Judge.

The facts are stated in the opinion of the court.

H. B. M. Miller, for Appellant.

Stidger & Stidger, and William F. Herron, for Respondent.

**THE COURT.**—This is an appeal from a judgment in favor of plaintiff in an action for damages for personal in-

juries, and from an order denying a new trial. The cause was tried before a jury.

The first contention of the appellant is directed against the alleged misconduct of counsel for plaintiff during the proceedings for the impanelment of the jury, consisting in asking of a prospective juror the question, "Do you know a corporation known as the General Accident, Life and Fire Insurance Company?" and in stating in substance, in answer to an objection to said question, that the defendant was indemnified by said corporation against liability for injuries of the nature of those involved in this action. The question and statement of counsel were assigned as misconduct. The court sustained the objection to the question, and a little later, when the same matter was again adverted to by plaintiff's counsel, and again assigned as misconduct, the court expressly admonished the jury to disregard any reference to outside matters, and confine themselves to the issues between the two immediate parties to the case. Still later, and during the cross-examination of one of the defendant's witnesses, counsel for the plaintiff asked him whether he had not been told by defendant to go down and make a report to the surety company in regard to the accident. This question was also objected to and assigned as misconduct, and the court again sustained the objection to it, but counsel for the defendant did not ask nor did the court give any further admonition to the jury.

In urging here the contention that by this repeated reference by counsel for the plaintiff to the effect that plaintiff was indemnified against an adverse verdict by a surety company, he was guilty of prejudicial misconduct requiring a reversal of the case, the appellant strongly relies upon the cases of *Roche v. Llewellyn*, 140 Cal. 563, [74 Pac. 147], and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, [118 Pac. 700], wherein the supreme court has declared it to be the law in this state that during the trial of an action for damages, evidence that the defendant has been indemnified against loss by a surety company is not only inadmissible, but that its offer on the part of the plaintiff is prejudicial misconduct.

It is, however, contended by the respondent that the first of the above-quoted cases has reference only to evidence offered during the actual trial, and that its doctrine is not to be extended to questions asked of jurors upon their *vow aïre* ex-

amination with a view to ascertaining whether they are connected in any disqualifying relations with an indemnifying company. It is insisted by respondent that such questions are in themselves admissible when asked of a juror, and even necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the real party interested in the defense of the action, and that such an inquiry being admissible, it could not be misconduct to pursue it in the examination of jurors; and it is further contended by the respondent that as to the case of *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, [118 Pac. 700], the language of the learned justice writing the opinion in that case is to be construed as being limited to cases where the inquiry of the juror is not made in good faith, but where the question is asked not for the purpose of ascertaining whether the juror is free from bias or interest which may affect his verdict, but merely for the purpose of getting the fact that the defendant is indemnified by a surety company before the jury. In support of these contentions the respondent cites a number of quite recent cases from other jurisdictions holding such questions proper when asked in good faith of a juror upon his *voir dire* examination, and notably the cases of *Blair v. McCormack Construction Co.*, 123 App. Div. 30, [107 N. Y. Supp. 750], and *Rinklin v. Acker*, 125 App. Div. 244, [109 N. Y. Supp. 125], wherein the rule for which the respondent contends is exhaustively set forth, and earlier cases cited and relied upon by the appellant are criticised.

We do not, however, deem it necessary to determine this disputed question in the instant case, for the reason that the record discloses that during a later stage of the trial the fact that the defendant was indemnified by the particular surety company adverted to was permitted to go before the jury in the form of evidence without objection, and that such evidence came from the lips of one of the defendant's own witnesses. This fact, taken with the further fact that the court did, in the earlier stages of the case, expressly instruct the jury to disregard all references to outside parties and confine their deliberations to the issues between the actual parties before the court, impels us to the conclusion that the question and suggestions of plaintiff's counsel cannot be held to have amounted to such prejudicial misconduct as to justify a reversal of the case.

It is further contended by the appellant that the evidence is insufficient to justify any verdict in plaintiff's favor, and particularly insufficient to justify a verdict for the sum of six thousand dollars, and that in this latter respect the verdict should be set aside as excessive.

On a careful review of the somewhat voluminous evidence in the case, we are of the opinion that there is a very substantial conflict upon the questions of the negligence of the defendant's employee, and as to the severity and permanence of plaintiff's injuries, and also as to the plaintiff's contributory negligence, and that therefore these were matters which were properly within the purview of the jury, with whose discretion we will not interfere.

The appellant finally urges that the court committed certain errors of law in overruling the defendant's objection to evidence offered on behalf of the plaintiff in support of the averments in her complaint, to the effect that she had been specially damaged in the sum of \$254.78, by reason of the fact that in consequence of her injuries she had been unable to keep up her payments upon a lot in Richmond, and as a result had lost the installments already paid amounting to said sum. The plaintiff pleaded this matter in detail in her complaint as special damages. The defendant, instead of seeking to eliminate this element of alleged damage from the complaint by proper motion, responded with denials which put in issue the matter so pleaded, and the parties went to trial upon the issue thus framed. The specific amount of such damage sought was fixed by these pleadings and by the offered evidence of the plaintiff in support thereof. The respondent, while not conceding that damages of this sort are not recoverable, is willing that the verdict should be reduced in that specific sum. We think these damages were too remote, and ought not to be allowed; but we do not think the judgment should be reversed for that reason, when, as the record shows, the precise amount of this alleged item of damage was definitely fixed at all times during the trial, and also when the parties were content to tender a direct issue as to the fact and amount of this item of alleged detriment. Under these conditions we think substantial justice will be done by reducing the verdict and judgment in the sum of \$254.78.

It is therefore ordered that the judgment be modified by striking therefrom the sum of \$254.78, and that otherwise

the judgment and order are affirmed, appellant to recover its costs upon this appeal.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 31, 1916.

---

[Crim. No. 464. Second Appellate District.—June 1, 1916.]

THE PEOPLE, Respondent, v. JACK RIZOTTO, Appellant.

**CRIMINAL LAW—EXTORTION—SENDING OF THREATENING LETTER—WRITING IN FOREIGN LANGUAGE—INFORMATION AND EVIDENCE—MATERIAL VARIANCE.**—In a prosecution for sending a threatening letter with intent to extort money and property, there is a fatal variance in the allegations of the information and proof received in support thereof, where the letter was written in the Italian language and the information set out the same as being in the English language, without any averment acquainting the defendant with the fact that the letter was written in the former language.

**ID.—EVIDENCE—FOREIGN DOCUMENT—WHEN INADMISSIBLE.**—Where an information is in fact based upon an instrument in a foreign language, which in the information is alleged to have been "in the words and figures following," followed by an English translation thereof, without disclosing the foreign origin of the document or the fact that the copy set out is a translation thereof, the original is not admissible in evidence as proof of such allegation.

**ID.—PLEADING OF FOREIGN DOCUMENT.**—In such a prosecution, where the pleader is not content with the statement of the legal effect of a foreign document, it is not only the custom, but sufficient to allege, that it is in the foreign language adopted, a correct translation of which is as follows, setting the same out according to its English meaning.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Carter & Torchia, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

SHAW, J.—Section 523 of the Penal Code provides that, “Every person, who with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section five hundred and nineteen, is punishable in the same manner as if such money or property were actually obtained by means of such threat.” And section 519 of the Penal Code provides that “Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; . . . ”

By an information filed by the district attorney defendant was charged with the offense defined by said section 523 of the Penal Code, in that, with intent to extort money and property from one Dominick Lauricella, he sent him “a certain letter and writing, which said letter and writing did then and there express and imply and was adapted to imply a threat to do an unlawful injury to the person and property of the said Dominick Lauricella, which said letter and writing was then and there and is in the words and figures following, to wit:

“Long Beach, July 5, 1915.

“Dear Friend:

“This day I tell you to bring One Thousand Dollars of which you know, at one o'clock you will take the road to Anaheim and look for an electric pole. You will find one with Number L20072 and there will be also the number of your house. Near to the pole you will find a pepper tree with a hole in it, and near to that pepper tree there is a can. Therefore, you will put the money in that can, and you will cover the same. You know very well what will happen to you if you don't do as we tell you and that is enough.”

At the trial, after showing that Lauricella had received through the postoffice a letter written in the Italian language, the people, over defendant's objection, were permitted to introduce such letter in evidence, followed by evidence of a translation thereof which, while widely different in words, in substance was the same as that set out and alleged in the information.

Appellant justly insists there was a fatal variance in the allegations of the information and proof so received in support thereof. "It is said by Wharton that when an indictment undertakes to set forth a document *in haec verba*, or according to its 'tenor,' or 'as follows,' or 'in words and figures following,' then any variance as to the words of the document, unless such variance be a mere fault of spelling, is material." (*People v. Phillips*, 70 Cal. 61, [11 Pac. 493].) There was nothing whatsoever in the information calculated to acquaint defendant with the fact that the letter which he was charged with sending to Lauricella was written in the Italian language. On the contrary, it was expressly and directly alleged, not only that it was in the English language, but the words and figures thereof were set out therein. Where the information, as here, is in fact based upon an instrument in a foreign language which in the information is alleged to have been "in the words and figures following," followed by an English translation thereof, without disclosing the foreign origin of the document or the fact that the copy set out is a translation thereof, the original is not admissible in evidence as proof of such allegation. (Townshend on Slander and Libel, sec. 330; *Stichtd v. State*, 25 Tex. App. 420, [8 Am. St. Rep. 444, 8 S. W. 477]; Wharton's Criminal Evidence, 10th ed., sec. 114a.) Where the pleader is not content with the statement of the legal effect of such instrument, it is not only the custom, but sufficient to allege, that it is in the foreign language adopted, a correct translation of which is as follows, setting the same out according to its English meaning. (*People v. Ah Woo*, 28 Cal. 205; *Stevens v. Kobayshi*, 20 Cal. App. 153, [128 Pac. 419].) Otherwise a defendant suffers prejudice, since, as here, before trial he was not informed that he would be called upon to defend himself upon a charge of sending a communication other than in the language with which he is charged. It would be unfair toward a defendant charged with sending a threatening letter in the English language, a copy of which is set out *in haec verba* in the information, to establish such fact by proof that it was a translation of Egyptian hieroglyphics or some secret code, without apprising him that the charge was based upon such code characters from which the letter set out purported to be deciphered. The rule invoked is not one of construction of the document so pleaded, but one of identity and description;

and in the absence of appropriate allegations, there is nothing in the information under which the letter received in evidence was admissible. There was a fatal and material variance in the allegation and proof offered in support thereof.

The appeal prosecuted by defendant is from the judgment and an order denying his motion for a new trial, both of which are reversed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1438. Third Appellate District.—June 2, 1916.]

**CALIFORNIA CENTRAL CREAMERIES COMPANY** (a Corporation), Respondent, v. **THE CRESCENT CITY LIGHT, WATER AND POWER COMPANY** (a Corporation), Appellant.

**FINDINGS—FAILURE TO SERVE ADVERSE PARTY—JUDGMENT NOT VOID ON FACE.**—A judgment is not void on its face by reason of the failure of the party directed to prepare findings to serve a copy of such proposed findings, as provided by section 634 of the Code of Civil Procedure, upon all other parties to the action at least five days before such findings are signed.

**ID.—JUDGMENT—WHEN VOID.**—A judgment is only void when, upon an inspection of the judgment-roll, it appears that the court either did not have or has exceeded its jurisdiction.

**ID.—ORDER DIRECTING PREPARATION OF FINDINGS.**—An order directing the preparation of findings is not a part of the judgment-roll, and, therefore, an inspection thereof would not disclose that such direction was given.

**ID.—APPEAL FROM JUDGMENT—WAIVER OF SERVICE OF PROPOSED FINDINGS—RECORD.**—Upon an appeal taken from a judgment upon the judgment-roll and a statement on appeal, it will be presumed that the appellant waived service upon him of the proposed findings, where the statement shows that the respondent was directed to prepare findings, and that they were prepared and signed on the same day, and no affirmative showing made that the appellant did not consent to such waiver of service.

**ID.—WAIVER OF SERVICE OF PROPOSED FINDINGS.**—The amendment to section 634 of the Code of Civil Procedure, requiring service of proposed findings at least five days before signing, was passed solely in the interest of parties litigant, and its provisions may be waived by them.

APPEAL from a judgment of the Superior Court of Del Norte County. John L. Childs, Judge.

The facts are stated in the opinion of the court.

F. A. Cutler, and Robt. W. Miller, for Appellant.

Gavin McNab, Hersch & McNulty, George W. Mordecai, and Oliver B. Wyman, for Respondent.

ELLISON, J., *pro tem.*—It appears from the record in this case that the court, on the sixteenth day of June, 1915, directed the attorneys for the plaintiff to prepare findings of facts, conclusions of law and judgment in favor of plaintiff and against the defendant; that counsel for plaintiff did prepare such findings and judgment and they were signed by the trial judge on said sixteenth day of June, 1915, and filed. Counsel for appellant invokes the provisions of section 634 of the Code of Civil Procedure, and claims that because said findings were not served upon him at least five days before being signed, the judgment is void. The part of said section relied upon by counsel is worded as follows: "In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days."

1. The judgment is not void. The court had jurisdiction of the subject matter of the action and of the defendant. The judgment rendered was one within the jurisdiction of the court. A judgment is only void when, upon an inspection of the judgment-roll, it appears that the court either did not have or has exceeded its jurisdiction. "Whether a judgment is void upon its face can only be determined by an inspection of the judgment-roll." (*People v. Temple*, 103 Cal. 447, [37 Pac. 414]; *Jacks v. Baldez*, 97 Cal. 91, [31 Pac. 899].) "The question is to be determined by an inspection of the record only. (*Butler v. Soule*, 124 Cal. 69, 72, [56 Pac. 601].) Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, it is not void on its face." (*Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 672, [74 Pac. 301].)

A judgment prematurely rendered is not void. Thus, a judgment rendered and entered against a defendant by default before the time allowed to him by law to answer is not void, but only erroneous. (*In re Newman*, 75 Cal. 213, [7 Am. St. Rep. 146, 16 Pac. 887].)

The direction of the court that plaintiff's attorney prepare findings and judgment is no part of the judgment-roll (sec. 670, Code Civ. Proc.), and hence an inspection of it would not disclose that such direction was given. Upon the face of the judgment-roll there appears a judgment of a competent court upon a subject matter within its jurisdiction, against a party properly before it, and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure may have occurred, such a judgment will not be held to be void, and is not.

2. Does the record affirmatively show error for which the judgment ought to be reversed?

There is in the record what purports to be a "Statement on Appeal," and from it we learn that the court directed the attorneys for plaintiff to prepare findings, and that they did so, and that they were signed and filed before the expiration of five days after service upon counsel for the defendant.

"It is presumed that the proceedings in the court below were regular, and where error is claimed it is incumbent upon appellant to show it affirmatively." (*Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, [95 Pac. 1128].) "When a judgment of a trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is prosecuted upon the judgment-roll, the error must appear upon the face of the record. Not only will error never be presumed but every presumption will be indulged in favor of upholding the judgment." (*Bliss v. Sneath*, 119 Cal. 526, [51 Pac. 848].) "In the absence of an affirmative showing that findings were not waived, in support of the order it will be presumed that they were waived. (*Mulcahy v. Glazier*, 51 Cal. 626; *Tomlinson v. Ayres*, 117 Cal. 568, 570, [49 Pac. 717].) It is not sufficient to merely specify the absence of findings as an error of law . . . but in the absence of findings, that findings were not waived, like any other error relied on for reversal, must be made to appear in the body of the

bill of exceptions or in some other appropriate way." (*Baker v. Baker*, 139 Cal. 626, [73 Pac. 469].)

Under the rule of law established in this state, in support of the regularity of the action of the trial court, nothing appearing to the contrary, it will be presumed that appellant waived the service upon him of the proposed findings or waived the five days' time allowed him to examine them, or that he was present when they were presented to the judge for signature and made no objection, but acquiesced in their being then signed. The record does not negative his consent or waiver, and it is not apparent that error was committed in signing the findings on the day they were signed.

3. It is finally claimed that a waiver of the five days' time in which to examine the proposed findings could not give the court jurisdiction to sign them before the expiration of that time.

The amendment to section 634 of the Code of Civil Procedure relied upon was passed solely in the interest of parties litigant, to give them an opportunity to suggest to the trial judge, before signing findings, certain matters they desired to have incorporated therein in their own interests. The amendment was not enacted for any public reason, and that the provisions of such a law could be waived by a party litigant seems clear. Section 3513 of the Civil Code provides: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." The distinction in the application of the first and second clauses of the section is well illustrated by the reasoning in the case of *Grannis v. Superior Court*, 146 Cal. 245, [106 Am. St. Rep. 23, 79 Pac. 891]. In that case it was sought to uphold a final decree of divorce entered before one year had expired after the trial and decision of the case. It was held that the public were interested in divorce cases; that the prohibition against granting a divorce until one year had expired was enacted in the interests of the public; that parties to such action have not the right to control procedure as in other actions; the state is "interested in the matter." "The rule in actions affecting property, that the parties interested may control the disposition of the interest involved, and that the judgment of the court will be made to conform to such disposition when ascertained, has no application to divorce cases. Hence it

follows that in such cases there can be no effectual waiving by the parties of any restriction established by law for the benefit of the public or for the protection of the interest which the state has in the preservation and permanence of the marriage relation."

Our conclusion is that the judgment is not void and that the record does not affirmatively show error.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 1, 1916, and the following opinion then rendered thereon:

ELLISON, J., *pro tem.*—In the petition for a rehearing filed herein it is stated: "The opinion herein is in error in stating that the appeal is prosecuted from the judgment-roll alone." We have reread the opinion carefully and fail to find any statement or any reasoning that would suggest that we claimed or assumed, in considering or deciding the case, that the record on appeal consisted only of the judgment-roll. On the contrary, the opinion expressly referred to the "statement on appeal," and discussed the force and effect of certain statements of facts therein contained. The court, in considering the case, at all times had it clearly in mind that it was an appeal from a judgment supported by a "statement on appeal," which was deemed for all purposes a bill of exceptions, and that the record contained the full judgment-roll properly certified to, as was also the "statement on appeal," and had no other thought.

Counsel for the appellant, in his brief filed before the cause was submitted, did not raise the point that the judgment was erroneous, but only contended it was void. In considering the claim made that the judgment was void, we first considered the question of whether an inspection of the judgment-roll alone would disclose that it was void, and held that it did not. It was stated in that connection that the order directing the attorneys for plaintiff to prepare findings is not made by law a part of the judgment-roll, and an inspection of it would not disclose that any such order had ever been made, and said: "Upon the face of the judgment-roll

there appears a judgment of a competent court upon a subject matter, within its jurisdiction, against a party properly before it and such a judgment as it was by law authorized to make. No matter what errors in practice or procedure occurred, such a judgment will not be held to be void." We still adhere to the above statement and conclusion. (See, in addition to the authorities referred to in the opinion, *People v. Davis*, 143 Cal. 673, [77 Pac. 651]; *Butler v. Soule*, 124 Cal. 69, [56 Pac. 601]; *Jacks v. Baldez*, 97 Cal. 91, [31 Pac. 899]; *People v. Temple*, 103 Cal. 447, [37 Pac. 414].)

In looking over the opinion it is noticed that, on page 2, line 3, it is said: "The judgment is not void." By inadvertence the words "on its face" were omitted, and it is probably this omission that has misled counsel as to the meaning and scope of the decision. The opinion will be corrected to read: "The judgment is not void on its face."

We next considered the case in view of the whole record, including the judgment-roll and statement on appeal. From the statement on appeal we found that the court had ordered the attorneys for the plaintiff to prepare findings; and that they were prepared and signed on the same day, but we held that the statement did not affirmatively show error, in that it did not show that appellant did not waive service of the findings upon him, and held that the judgment could not be reversed unless error was affirmatively shown, all presumptions being in favor of the regularity of the court's rulings, finding, and decision. The questions of whether the provisions of section 670 of the Code of Civil Procedure were mandatory or directory were fully disposed of for the purposes of this case, when we held that its provisions were passed for the benefit of individual litigants, not from considerations of public interest, and that a litigant could waive the five days' notice.

All points in the case have received careful consideration in the light of the judgment-roll and statement on appeal, and being satisfied with the conclusion reached, the petition for a rehearing is denied.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 31, 1916.

[Crim. No. 484. Second Appellate District.—June 2, 1916.]

**THE PEOPLE, Respondent, v. ALONZO PASQUERIA,  
Appellant.**

**CRIMINAL LAW—ROBBERY—APPEAL—WHEN VERDICT CONCLUSIVE.**—A verdict of conviction of the crime of robbery is conclusive upon appeal, where the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict.

**ID.—EVIDENCE—RECALL OF PROSECUTING WITNESS—LACK OF PREJUDICE.** In a prosecution for the crime of robbery the substantial rights of the defendant are not prejudiced by the action of the court in recalling the prosecuting witness after the close of the people's case, and interrogating him as to the taking of money from his pocket by the defendant, where such interrogation was for the purpose of clearing the mind of the court upon that part of the witness' testimony.

**ID.—DEPOSITION TAKEN AT PRELIMINARY EXAMINATION—ABSENCE OF WITNESS.**—The deposition of a witness given at a preliminary examination may be admitted in evidence upon a showing that the witness has left the state and will not return.

**ID.—OBJECTIONS TO QUESTIONS—RIGHT TO MAKE AT TRIAL.**—Such a deposition is subject to the same objections as though the witness were present and testifying, and the fact that no objections were interposed by the defendant when the testimony was given does not bar him from objecting when the same is read at the trial.

**APPEAL** from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Herbert N. Ellis, and C. B. Ellis, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

**SHAW, J.**—Defendant was convicted of the crime of robbery. He appeals from the judgment and an order of court denying his motion for a new trial.

There is no merit in appellant's contention that the evidence is insufficient to justify the verdict. The testimony of

Tom Jing, the prosecuting witness, is to the effect that defendant, shortly before 6 o'clock P. M., November 2, 1915, entered his place of business, claiming to be a detective, in proof of which he exhibited what purported to be an official star, and accusing Jing of having lottery tickets in his possession, stated that he wanted to search his place. Thereupon defendant, under the pretense of making a search for lottery tickets, put his hand in Jing's pockets and took therefrom a pocketbook and purse, from which he abstracted \$30 in money, a diamond ring valued at \$65, and a stickpin worth \$15, and putting them in his own pocket, struck Jing upon his jaw and ran out of the store, followed by the prosecuting witness, who later pointed out defendant to a police officer, who arrested him. At the trial Jing positively identified defendant as the man who, in the manner stated, had taken his property. This and other evidence, with circumstances established, if believed by the jury, was sufficient not only to justify it in the conclusion that defendant took the property, but that such taking was accompanied by all the elements constituting the crime charged. (Pen. Code, sec. 211.) Hence, it was not error, as claimed by appellant, for the court to instruct the jury as to what constituted robbery.

Counsel for appellant at great length reviews the evidence, and devotes much of his brief to a discussion of the weight which should be accorded the conflicting testimony of witnesses called at the trial, and asserts with much show of sincerity that the testimony of "a former member of the Chicago police department is far more likely to be accurate than that of the excited Chinese complaining witness." With reference to this observation and the lengthy discussion of the subject indulged in by counsel, we can only repeat what has so often been said by the appellate courts of this state, namely: "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." (*People v. Emerson*, 130 Cal. 562, [62 Pac. 1069].)

It is claimed that the substantial rights of defendant were prejudiced by the action of the court in recalling the prosecuting witness after the close of the people's case and interro-

gating him as follows: "The Court: There is one point I wish to ask him on that is not clear in my mind. You have stated you had your money in your right-hand trouser pocket? A. Yes, sir. The Court: Who took the money out of that pocket? A. The defendant here." The witness had theretofore testified as follows: "Q. Where did you have the money? A. On my pocket here. Q. Which pocket? A. The front pocket. Q. Which side,—left or right? A. On this side; and then after that he put his hand on this pocket and took my pocketbook out, and after that he put his hand on this pocket and took my purse out, and he couldn't open that purse, it is a spring-purse, and I opened and showed him." And when asked how much was taken out of "your right-hand pocket," he replied: "I later remember I got \$30 there, because I got \$30 to pay my rent." There was nothing in the question of the court calculated to impress the jury that he thought defendant was guilty. As stated, the interrogation was for the purpose of clearing the mind of the court upon the subject of the inquiry. The answer was but a reiteration of what the witness had already testified to. The facts presented furnish no ground for the claim that the court was guilty of misconduct to the prejudice of defendant. On the contrary, since Jing had theretofore testified that defendant took the money out of his pocket, the question was in the nature of cross-examination, in reply to which Jing might have modified his former answer, making it more favorable to defendant.

Defendant's objection to the admission in evidence of the deposition of one Kingsley, given at the preliminary examination, was overruled. It appears that Kingsley had left the state and would not return. Upon such showing, the evidence contained in the deposition, so far as competent, was clearly admissible at the trial of defendant. (Pen. Code sec. 869; *People v. Oiler*, 66 Cal. 102, [4 Pac. 1066].) At the close of the reading of the deposition, defendant moved the court to strike therefrom evidence relating to statements made by Jing, upon the ground that they were incompetent. Counsel did not, other than in this general way, direct the court's attention to any particular testimony. Nevertheless, the court granted the motion as made, saying: "It is difficult for the court to rule on the motion intelligently. Some of them apparently were made while the defendant was in hearing;

some of them apparently were not so made. Of course if the defendant was not in hearing or might reasonably have heard what was said, it would not be binding upon him." Thereupon defendant's counsel said: "Will you instruct the jury to disregard any statement?" to which the court replied: "I have already told them as to evidence that is stricken out." The court having stated that defendant would not be bound by statements of Jing not made in the former's hearing, this was, under the circumstances, sufficient, and, upon the motion made, all that defendant had a right to ask. Certainly there was no error in refusing to "instruct the jury to disregard any statement," as requested by counsel. During the reading of the deposition counsel for defendant interposed an objection upon the ground that the question was incompetent, to which the court replied: "There was no objection made below; there having been no objection made or motion to strike out this evidence in the court below at the preliminary, the objection now will be overruled." As an abstract proposition of law, the statement of the court may be conceded to have been erroneous. While, as provided by section 869 of the Penal Code, the deposition of one testifying at a preliminary hearing may, under the circumstances there mentioned, be used at the trial, nevertheless, when so used, it is subject to the same objections as though the witness was present and testifying. The fact that no objection was interposed by defendant when the testimony was given before the magistrate does not bar him from objecting when the deposition is read at the trial. (Pen. Code, sec. 1345.) While it is true the court did not err in overruling the objection, the incompetency of which was based upon the claim that it was a statement made by Jing without the presence of defendant, since, as appears from the record, he was but a few feet away and near enough to have heard the statement. (*People v. Osaki*, 25 Cal. App. 330, [143 Pac. 789].)

Another alleged error is based upon the fact that the court denied defendant's motion to strike out an answer given by Officer Cooley to the question: "What else was said there by the Chinaman in the presence of the defendant?" To which he replied: "The Chinaman was excited and kept talking, 'This is the man that robbed me.' I didn't pay attention to everything that he did say; he talked consider-

able." There is no merit in the contention. Conceding the court admitted in evidence portions of the deposition which might be said to be immaterial and to which objections interposed were overruled, defendant's substantial rights could not have been prejudiced thereby.

The judgment and order appealed from are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 31, 1916.

---

[Civ. No. 1984. Second Appellate District.—June 2, 1916.]

FRED S. WHITCOMB, Respondent, v. CHASTINA M. WORTHING et al., Appellants.

**DEED—CONVEYANCE BY WIFE TO HUSBAND—LIFE ESTATE.**—A deed of grant by a wife to her husband providing that the property is conveyed to the latter "so long as he shall live, but at his death the said above-described property to revert to the heirs of the said party of the first part," followed by other general terms to the effect that all and singular the tenements, appurtenances, etc., were to pass "unto the said party of the second part, his heirs and assigns forever," passes only a life estate to the grantee.

**ID.—CONSTRUCTION OF DEEDS.**—Deeds are to be construed like any other contracts, and the intent of the parties arrived at by a consideration of the whole instrument and not of detached clauses.

**ID.—PURCHASE OF LIFE ESTATE—ADVERSE POSSESSION—RUNNING OF STATUTE.**—Title by adverse possession to property conveyed by such deed cannot be acquired by the purchaser of such life estate against the heirs of the original grantor during the lifetime of the grantee named in the deed, and the statute of limitations, therefore, does not begin to run against such heirs until the death of such grantee.

**ID.—APPEAL FROM ORDER DENYING NEW TRIAL—GROUNDS OF MOTION—SUFFICIENCY OF RECORD.**—Upon an appeal from an order denying a new trial, a review of the order is not precluded by reason of the omission to state the grounds of the motion or order, where the transcript shows that the appellants served and filed their notice of intention to move for a new trial, and such notice is set out with general specifications of error.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Tobias R. Archer, for Appellants.

George H. Woodruff, and Clyde C. Shoemaker, for Respondent.

JAMES, J.—Action to quiet title to a town lot located in the county of Los Angeles. Plaintiff had judgment from which certain of the defendants appealed. There was also an appeal from an order denying a motion for a new trial. This court heretofore dismissed the appeal from the judgment, and we have to consider questions presented by the motion for a new trial.

The appellants are heirs of Mary A. Gaylord, in whom title to the lot in question was absolutely vested in the year 1889. Subsequent to the year referred to said Gaylord became the wife of J. F. Twitchell. On December 3, 1891, she by deed conveyed to her husband four lots of land, which included the lot in question, and thereafter, on December 9, 1891, she died. The surviving heirs were her said husband and five children, among the latter these appellants. The deed given by Mrs. Twitchell to her husband in 1891 was, as to its general form, a deed of grant, with the usual preliminary recitations that the grantor did "give, grant, alien and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces or parcels of land situate," etc. A description of the property conveyed followed, and then occurred this clause: "Together with all water rights thereunto belonging, to the party of the second part, so long as he shall live, but at his death the said above described property to revert to the heirs of the said party of the first part." Other general terms followed to the effect that all and singular the tenements, appurtenances, etc., were to pass "unto the said party of the second part, his heirs and assigns forever." The question as to whether this deed passed a fee title or only a life estate is one of the propositions argued in the briefs, the importance of which will appear in our later statements. As we

construe the instrument, however, we are satisfied that the intent was to restrict the estate in the hands of Twitchell, the husband, with the result that the only interest acquired by him in the real property was one which terminated upon his death. Deeds are to be construed like any other contract and the intent of the parties arrived at by a consideration of the whole instrument and not of detached clauses. (*Firth v. Los Angeles Pacific Land Co.*, 28 Cal. App. 399, [152 Pac. 935].) Having announced this preliminary conclusion as to our construction of the deed given by Mrs. Twitchell to her husband, a further statement of the undisputed facts is as follows: On July 7, 1893, the lot in question was sold for the nonpayment of state and county taxes to S. M. Patten and a certificate of tax sale was issued to the purchaser. So far as the record shows, no tax deed was ever issued thereon. On August 14, 1895, J. F. Twitchell, the holder of the life estate, by quitclaim deed, conveyed his interest in the lot to the wife of Patten. It is not shown when the Pattens, or either of them, took actual possession of the lot, but it may be assumed that they did so in 1895, upon receiving the quitclaim deed from Twitchell. On April 21, 1896, the plaintiff purchased the lot from Patten and his wife, and took an assignment of the certificate of tax sale and also a quitclaim deed from the Pattens. This quitclaim deed contained the following clause: "This conveyance is made to release all claim which the said parties of the first part have to the above described property on account of the life interest in the same of J. F. Twitchell, a widower, which said interest was duly assigned to the said Jefferson Patten on the 14th day of August, A. D. 1895, and also to release all claims acquired by the said parties of the first part or either of them on account of any tax sales of the above described property prior to the date of this instrument." The plaintiff, upon receiving the assignment of the tax sale certificate and the quitclaim deed from the Pattens, entered upon possession of the lot and continuously thereafter farmed and cultivated the same and paid all taxes which had been levied and assessed since the year 1895. He claimed to be the absolute owner of the property, notwithstanding the fact in his quitclaim deed from the Pattens it was expressly stated that the intent was in part to transfer the estate which the Pattens had acquired "on account of the life interest" of

Twitchell. Twitchell died in February, 1912, and this action was commenced on October 7, 1912. No claim is made, and indeed none could be maintained, that title was acquired under the transfer of the certificate of tax sale. Twitchell during his lifetime possessed the right to use and occupy the property; therefore, his possession could in no case have been adverse to the claim of these appellants, the heirs of Mrs. Twitchell. Twitchell's grantee necessarily would be in no better situation with respect to that matter. The conclusion must necessarily follow that, so far as this plaintiff is concerned, or his immediate predecessors in interest, the Pattens, possession of the lot as against the title of the heirs of Mary Twitchell did not and could not begin to be adverse until the death of Twitchell, which occurred, as before stated, in February, 1912. The statute of limitations, the running of which would confer prescriptive title upon the plaintiff, was not therefore set in motion until Twitchell died. (*Mann v. Mann et al.*, 141 Cal. 326, [74 Pac. 995].) The plaintiff did not wait for the period to expire requisite to sustain a prescriptive title, but about eight months after the death of Twitchell brought this action. That the appellants may have prior to the trial of the action declared in an *ex parte* manner that they claimed no interest in the lot, was not an admission which would estop them from asserting title by pleading and proof, as they did in this action. There was a suit brought by Twitchell against the heirs to determine the respective rights in the lots included in the deed given Twitchell by his wife, which suit resulted in its being adjudicated that the interest granted was a life estate only. There was no determination made in that action as to the condition of the title to lot 23, that being the lot now in controversy. Twitchell therein alleged in his complaint that the lot was of "little or no value and which has been sold for taxes and not redeemed." The failure of the court to include this lot in its judgment in that action cannot be held to amount to a confirmation of the absolute title in Twitchell, or in the plaintiff or his predecessors in interest. There was simply a failure to determine the legal condition of the title—made, no doubt, for the reason that the parties assumed that the tax sale had foreclosed their rights in that property.

Objection is made that the ruling on the motion for a new trial should not be considered, in that the grounds of the

motion are not stated. It does appear on page 44 of the transcript, and as a part of the statement settled by the trial judge, that the appellants served and filed their notice of intention to move for a new trial, and such notice is set out with general specifications of error. In the case cited by respondent (*Morcom v. Baiersky*, 16 Cal. App. 480, [117 Pac. 560]), where this court declined to review the ruling on a motion for a new trial, the notice of intention did not appear in the transcript, nor were any of the grounds stated from which it could be determined what questions were before the trial court on the motion. The record here is not deficient in the same respects as was that in the case last cited. The decision in *Cross v. Mayo*, 167 Cal. 594, [140 Pac. 283], is an authority as to the sufficiency of a record like that here presented to authorize the court to review the order made on motion for a new trial.

For the foregoing reasons we conclude that the trial court was in error in its judgment and that the motion for a new trial should have been granted.

The order denying the motion for a new trial is reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 31, 1916.

---

[Civ. No. 1468. Third Appellate District.—June 2, 1916.]

**JOAQUIN FONTS, Respondent, v. SOUTHERN PACIFIC COMPANY (a Corporation), Appellant.**

**NEGLIGENCE—UNLOADING OF STEEL SHAFTING FROM FREIGHT-CAR—METHOD OF REMOVAL—CARELESSNESS OF FOREMAN—FAILURE TO GIVE WARNING AS TO INTENTIONS.**—A railroad company is liable in damages for personal injuries received by an employee of a traction company, who had been loaned to it for the purpose of assisting its section foreman in unloading a heavy and unwieldy steel shafting from a freight-car to the station platform, where such injuries were occasioned by the act of the foreman in raising the shafting on

to the steel apron connecting the car door with the platform, which caused the shafting to slide and fall, without first giving the plaintiff or any of his assistants notice of his intentions so to do.

**ID.—EVIDENCE—PROPER METHOD OF UNLOADING—OPINION OF EXPERIENCED DRAYMAN.**—In an action for damages for such injuries, the opinion of an experienced drayman accustomed to handling heavy and cumbersome materials of all kinds is admissible as to the proper or more skillful way of removing such shafting.

**ID.—RULES AND METHODS OF WORK—DUTY OF MASTER—PROPER INSTRUCTION.**—In such an action an instruction is not inapplicable that it is the duty of the master to exercise reasonable and ordinary care to adopt "safe rules" and methods of work, and that such duty is one that cannot be delegated in such a manner as to relieve the master from responsibility therefor.

**ID.—DUTY TO GIVE WARNING—UNOBJECTIONABLE INSTRUCTIONS.**—The reading to the jury of several instructions in which it was stated, in substance, that, if they believed from the evidence that the method adopted for unloading the shafting was a perilous one, and "that the perils of the method so adopted were known to defendant's foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plaintiff thereof, and if you believe from the evidence that the plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant and for the plaintiff," is not subject to the objection that thereby the court unqualifiedly and plainly told the jury that the duty to give warning rested on the defendant.

**APPEAL** from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. William H. Waste, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, Stanley Moore, George K. Ford, and Wilder Wight, for Appellant.

Robinson & Robinson, and Harry L. Price, for Respondent.

**THE COURT.**—Appellant has not pointed out any inaccuracy in the statement of facts as made by respondent, and it may be accepted substantially as the basis for a consideration of the legal questions argued by counsel. That statement, as far as any conflict exists, is the deduction from the testi-

mony favorable to respondent, but, of course, no valid objection on that account can be urged to our according it full credit, since it is not inherently improbable. The action was on account of personal injuries received by plaintiff while in the employment of defendant in assisting in the removal of a steel shafting from a freight-car to the station platform, and resulted in a judgment in his favor for three thousand dollars. Plaintiff was in the general employment of C. L. Best Gas Traction Company as a molder's helper, and had been loaned to defendant for the special work in which he was engaged when injured. He had been employed for only a few days by said traction company before the accident occurred. Said shafting was about twenty-one and one-half feet long, six inches in diameter, and weighed about one thousand five hundred pounds. It was smooth and round and was to be used for axles for traction engines. It was in a boxcar placed on a sidetrack near Elmhurst station and was a part of a shipment which it was the duty of defendant to unload. A few days prior to the accident, one Charles Forsyth, defendant's section foreman, had tried to unload the piece of shafting with the aid of three other men, but found it was too heavy for them to handle. He therefore notified the agent at said station that he needed more men. Said agent then telephoned to said traction company for more men. Accordingly, two more men were sent, but the six were unable to lift the shafting, and, upon request, plaintiff and another man were sent. Mr. Forsyth had sole charge of the men and was boss of the operation of unloading. The eight men were not able to lift the bar from the floor so as to carry it out of the car. Before the accident one of the workmen informed said station agent that the bar was too heavy for the men to handle. The eight men, however, after great effort, succeeded in lifting one end up to and through the window at the end of the car. The bottom of the window was about three feet and seven inches from the floor of the car and was covered with a smooth piece of steel. The car floor was entirely of wood. The end of the shaft was pushed about three feet through said window, with the other end resting upon the wooden floor about four feet from the car door. Mr. Forsyth, with a "pinch-bar," proceeded to move the lower end of said shafting toward said door, moving it about two inches at a time. There was an "apron"

consisting of a steel plate placed between the car and the station platform, connecting the open car door with the platform below. The station platform was several inches below the car floor, so that the steel apron was inclined at about the same angle as the shafting. The end of the steel apron extended above the car floor, so that a person attempting to pinch the shafting on to the apron would be required to raise the bar several inches. This inclined steel apron had been used a great deal and had been worn smooth. While Mr. Forsyth was thus pinching the bar, the eight men were distributed along in close proximity to it, some on each side, plaintiff with two or three others having their backs toward the car door. Plaintiff occupied a position at the greatest distance from Mr. Forsyth, being at the end and corner of the car. At the time of the accident someone was looking for rollers to place under the shafting so that it could be rolled out of the car. Before, however, the rollers could be obtained, Mr. Forsyth, without giving any warning, raised the bar on to the steel apron. It is stated by appellant that it is obvious that "the bar would slip when the end Forsyth was prying reached the steel apron. We all know that iron produces but little resistance upon iron." The shafting gave an instantaneous jump, slid for an instant, and came down like a shot. The helpers were surprised and several of them narrowly escaped injury, plaintiff having his foot and toes mashed and his body severely bruised.

The gist of plaintiff's claim from the foregoing facts is that, "Defendant company failed to supply Forsyth with sufficient men to properly lift the bar down. Forsyth failed to warn the men of what he was going to do, but instead allowed the men to remain grouped around the shafting while he kept his intentions entirely to himself, raised the bar on to the steel shafting, and caused it to fall down. Forsyth failed to explain to his men the method of work he was going to follow, and allowed all of them to believe that he would cease pinching before the shafting reached the apron and to believe that the bar would be lifted down from the car window rather than to be suddenly precipitated to the floor. He alone knowing that he was going to put the smooth steel shafting upon the smooth steel apron failed to take reasonable or any precautions to prevent this slippery piece of smooth shafting from falling upon the men grouped around it. The

recklessness of this act is shown by the fact that the operation of tying a piece of rope around the center of the shafting and fastening the rope around the drawhead of the car would have absolutely prevented the shafting from falling."

We think in the particular thus pointed out by respondent there is presented a sufficient case of negligence, within the purview of the authorities, to warrant the finding of the jury. In fact, it appears to us that Forsyth is chargeable with a high degree of carelessness in failing to give warning to the workmen of his intention. Of course, he may have believed, and had cause to believe, that they were not ignorant of his purpose, but we cannot so accept the facts. The want of knowledge on the part of plaintiff and the failure of Forsyth to apprise him of what the foreman intended to do seem to be the vital features in the case as far as the liability of defendant is concerned.

Appellant argues, with force and zeal, that the danger was so obvious that the injury must be said to be the result of respondent's own gross and stupid negligence. This view, however, assumes that he had knowledge of the conditions that made the danger imminent and manifest. This assumption, however, as we view it, constitutes the false premise in appellant's argument. There is room for the inference, let us repeat, that not only did plaintiff have no intimation or knowledge that Forsyth intended or was about to raise the end of the bar on to the apron, but he had reason to believe that an entirely different method would be adopted.

In addition to the foregoing contention many points are made by appellant, some of which, presented in the opening brief, are apparently abandoned in the closing argument, and will, therefore, receive no specific attention.

Among the incidents of the trial—quite out of the ordinary, we should say—is what respondent denominates the "fainting episode." Plaintiff, while on the witness-stand, lost consciousness and fell from his chair. The contention in brief is that this circumstance must have excited the sympathy of the jury, which controlled, or at least influenced, their verdict. In the morning he had been on the stand for some time, within which he had exhibited his injured foot to the jury. In the afternoon he had undergone a searching cross-examination for probably an hour when the unfortunate incident occurred. Defendant did not complain of it for sev-

eral days thereafter, nor is there any contention that the plaintiff was not fully cross-examined after he recovered from his indisposition.

Respondent charges the incident to the menacing conduct of appellant's counsel, and claims that if any detriment was suffered thereby they are responsible for it. It is also argued that, under the peculiar circumstances developed by the cross-examination, the temporary collapse of the witness probably injured his own cause rather than that of his adversary. From a reading of the record we are not justified in holding that there was anything improper in the conduct of said counsel, but we can readily understand how a plaintiff, unacquainted with court proceedings, nervous from sickness and suffering, unfamiliar with our language and naturally timorous under the influence of a strange judicial investigation, might necessarily misconstrue what was said and done, and be affected thereby as grievously as is claimed. However, we need not pursue the subject, as, of course, we cannot say that the verdict of the jury was influenced thereby. The presumption is, manifestly, that they regarded their oaths and determined the cause according to the law and the evidence. If there had been simulation on the part of plaintiff or other intentional misconduct, the case would be obviously different. But to grant a new trial in consequence of the unavoidable illness of plaintiff, sudden though it be and in the presence of the jury, would certainly be something novel in the history of judicial proceedings.

One of the considerations in the case treated most seriously grows out of the action of the court in overruling the objection of appellant to a question propounded to one James Henneberry, an experienced drayman. The interrogatory is of considerable length, reciting the facts as to the freight-car, the length and weight of the shaft, its position resting upon the window and the floor of the car, the position of the sheet-iron apron, the act in moving the lower end of said shaft toward the door of the car and culminating in throwing said shaft on to said apron, nothing else being done in the way of anchoring the shaft or preventing it from slipping, and concluding: "That on either side of this piece of shafting were stationed seven men, besides one who was doing the prying with that bar; it being the plan, after having lifted this shaft into the window, to take it down

again in the manner in which they had raised it, that is, by the men themselves. Would you say, under the circumstances, that was a proper mode of taking the shaft from the car?" The objection was that "it is not a fair statement or a hypothetical question; also because the matter is not the subject of expert evidence. It does not lay within the domain of expert evidence at all." The answer was: "I do not think so." A similar objection was also overruled to the following question: "What reasonable precautions could have been exercised in order to prevent this shaft slipping through and from the window and falling to the floor, as it did, as detailed in my question?" The answer was: "The simple method would be to lash it to prevent it from slipping. Just lash a piece of rope around about the center of the shaft, and a couple of men take hold of the end of the rope, prevent it slipping out of the door." The witness further explained, over objection: "I would have blocked up under the shaft on the floor of the car. That would be the proper precaution to prevent it from falling to the floor, to put some blocks across here, which would also be underneath that piece of shafting, and after it was pried to the door, to have the block with the end on rollers, to get it out afterward."

The first objection going to the hypothetical character of the question is not pressed, and we may pass it by with the remark that a basis for the question is found in the record. The second objection, viz., that the matter about which the witness was asked to give his opinion is not among those subjects as to which expert testimony is necessary and allowable, is not, in our opinion, well taken. The general rule is, of course, "that the opinions of witnesses are never to be received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury." (1 Greenleaf on Evidence, sec. 441b.) Or, as the proposition was clearly stated by Campbell, J., in *Evans v. People*, 12 Mich. 35: "Where the court or jury can make their own deductions they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not be received."

The general test, then, is: Is the matter upon which the opinion of a witness may be asked one as to which the jury themselves are capable of forming a judgment from a description thereof by other witnesses? And, measured by this test, we are inclined to the belief, as before stated, that the opinion of the witness in this case as to the *proper* or the more skillful mode of removing, down an incline, a heavy, cumbersome, and unwieldy steel shafting, such as the one described in this case, from a freight-car to the station platform, was not only proper but necessary to a correct solution by the jury of the ultimate question whether the plaintiff's injuries were sustained through the negligence of the defendant by its employee in immediate charge of the work. As seen, the shafting was smooth and round, and weighed about one thousand five hundred pounds. Quite naturally, when raised to an inclined position, it would easily slide downward, and, if not properly handled, with suddenness and great force. This would particularly be the result where, as here, the smooth iron or steel shafting is moved on to and over a steel-plated apron, worn smooth by use, and inclined at approximately the same angle as the shafting itself. It is, therefore, plainly manifest that no person but one accustomed to the handling of such heavy and unwieldy materials would know precisely the proper method which, under all the circumstances shown here, ought reasonably to be adopted for the removal of such a piece of iron or steel of the heft and unwieldiness of the shafting in this case from one place to another with safety to those engaged or employed in the work of such removal, where, as in the present case, the removal required the shunting of the iron down an incline to the place to which it was to be removed. How such removal is to be accomplished with safety to those engaged in the work of removal is a matter which can, obviously, be the better determined by those who have had experience in the handling of ponderous and unwieldy materials. It is extremely doubtful whether the average jurymen or average judge would be able to say, from the manner of the removal of the shafting from the freight-car to the platform as described by witnesses in this case, whether the method so shown was the proper method for its removal to insure the protection of those engaged in so removing it against injury or misadventure of any sort.

As shown, the witness, Henneberry, was an experienced drayman, and as such had been accustomed to handling heavy and cumbrous materials of all kinds. By this experience he undoubtedly acquired a skill in the loading and unloading of heavy freight under a variety of circumstances which a person having no such experience could not be expected to be possessed of. Necessarily a person of such experience would know much better than one having no such experience how to proceed in such a case, and to prosecute the work of removal according to that method which his experience had taught him was the safer or the less attended by danger to those actively connected with the work. And necessarily, therefore, his opinion as to the proper method of carrying on the work would be superior to that of the jury founded upon the testimony of witnesses who had given only a general description of the circumstances under which the work of removal was attempted. It hence follows that the matter upon which the witness was permitted to express his opinion was not one within the common knowledge of men, and that the testimony was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue.

The conclusion thus reached upon this point is, we think, sustained by the cases. A few of these we may well refer to.

In *Dyas v. Southern Pacific Co.*, 140 Cal. 296, [73 Pac. 972], the plaintiff was injured by an insecure derrick, and the court held that "derricks, being of such limited use and complicated construction that an ordinary person is not familiar therewith, civil engineers of long experience who are familiar with the mechanical principles on which they are constructed and operated and with their strength and use, are competent to testify as expert witnesses in relation thereto and as to the sufficiency and security of the counterbalancing and fastening of the derrick in question." The case is an instructive one, and sets forth clearly the principle upon which such evidence is admitted.

*Snyder v. Holt Mfg. Co.*, 134 Cal. 324, [66 Pac. 311], was an action for personal injuries, caused by reason of the separation of a defective bolt and nut used to connect the header and separator in a sidehill combined harvester, manufactured for and sold to the plaintiff by the defendant, and it was held that "the question whether the bolt and nut were proper and

sufficient for the coupling together of the parts of the harvester is peculiarly one for the evidence of a qualified expert, experienced in the construction of such machinery for the purpose intended."

In *Silveira v. Iversen*, 128 Cal. 187, 190, [60 Pac. 688], it was held proper to ask a witness: "How can it be determined, Mr. Erickson, whether a rope has become rotten and unsound?"

In *Callan v. Bull*, 113 Cal. 593, [45 Pac. 1017], plaintiff was injured through the negligent construction of a jetty, and witnesses were called as experts in his behalf for the purpose of showing that the structure to which a certain mat was suspended was not properly constructed to sustain the weight of the mat, and also to show what weight a cap of the dimensions of the one in question would sustain. These questions were objected to by the defendant, upon the ground that it was for the jury to determine, from the facts that might be shown in the case, whether the structure was properly made. But the supreme court said: "These objections were properly overruled. The matters sought to be shown by these witnesses . . . were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study. (*Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131, [35 N. E. 675].)"

In *Howland v. Oakland Consol. St. Ry. Co.*, 110 Cal. 513, [42 Pac. 983], expert testimony was admitted as to whether defendant's car could, with proper care and attention, have been stopped in time to avoid a collision and the supreme court said: "Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. The manner of running electric cars, their rate of speed and the facility with which they can be stopped or handled, is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was, therefore, proper to resort to expert evidence."

*Mulholland v. Western Gas Construction Co.*, 21 Cal. App. 44, [131 Pac. 110], involved personal injuries through the explosion of a scrubber in a plant, and a witness was permitted to answer over objection these questions: "Is it proper, considering the safety of employees, to equip a scrubber without steam pipes?" "What is necessary to make a plant reason-

ably safe for the protection of the plant?" "Is the steam pipe necessary for the safety of the men in and about the plant?" It is true that the court said that "if his answer as to what would be a safe way to equip a scrubber stood alone without explanation, we should be inclined to hold that the overruling of objection thereto was prejudicial error," but the witness gave the reasons for his conclusion, and this rendered innocuous the form of the question, so the court held, intimating, however, that it was so largely a matter of discretion with the lower court, that if the ruling had been the other way, it would not have been error.

In *McLain v. Dahlstrom Metallic Door Co.*, 19 Cal. App. 475, [126 Pac. 391], plaintiff was injured by an insecure elevator, and it was held that the lower court properly allowed evidence to show the insecurity of a knot such as that shown, and the mode of tying knots in such a way as to prevent slipping and accident, which is proper matter of skill, and to show the weakness which was apparent from an inspection of the insecure knot, if had.

In *Colsh v. Chicago R. R. Co.*, 149 Iowa, 176, [Ann. Cas. 1912C, 915, 34 L. R. A. (N. S.) 1013, 127 N. W. 198], it was declared that expert testimony is admissible on the question of the proper loading of livestock in a car.

In *Leslie v. Granite Ry. Co.*, 172 Mass. 468, [52 N. E. 542], it was held that an expert can testify as to the methods of handling heavy stones with a derrick.

In *Smith v. Dow*, 43 Wash. 407, [86 Pac. 555], the court declared that an expert may state that the method used in tying lumber for hoisting was not safe.

In *Palmquist v. Mine & Smelter Co.*, 25 Utah, 257, [70 Pac. 994], it was held, in an action for personal injury alleged to have been sustained in moving a boiler, that expert evidence as to the proper method of moving boilers and the appliances ordinarily connected therewith is competent.

For further illustration of the application of the rule permitting opinion testimony, we refer to the following cases: *Zarnik v. Reiss Coal Co.*, 133 Wis. 290, [113 N. W. 752]; *Alabama So. Ry. v. Vail*, 155 Ala. 382, [46 South. 587]; *O'Brien v. Look*, 171 Mass. 36, [50 N. E. 458]; *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, [124 N. Y. Supp. 541], a case which, on its facts, is strikingly similar to the case at

bar; *Meiley v. St. Louis & S. F. Ry. Co.*, 215 Mo. 567, [114 S. W. 1013].

Counsel for the appellant cite many cases which, they insist, support the view that the opinion of the witness, Henneberry, was upon a matter within the knowledge of the jury, or, in other words, not within the range of those subjects upon which the opinions of experts may be received. We need not take the time to review herein all those cases. It is sufficient to say that we have carefully read them and found no difficulty in distinguishing them from the present case. The facts are wholly different from those of this case. The opinion testimony which had been allowed by the trial courts in those cases and which the appellate courts held to be incompetent and inadmissible related to ordinary matters as to which the average person could form a correct opinion without the aid of the opinion of those claiming to have had special experience in such matters. For instance, it was held by the supreme court of Iowa that the opinion of a witness as to the number of men necessary properly and safely to move a locomotive tender loaded with coal by means of a pinch-bar was upon a matter which the jury themselves were competent to determine from a simple statement of the facts. (*Cahow v. Chicago Ry. Co.*, 113 Iowa, 224, [84 N. W. 1056].) And likewise, in an action wherein the plaintiff set up personal injury through the negligence of the defendant in not properly securing pipe which was being hoisted in bundles of six, it being claimed that the defendant had negligently failed to place bagging at the end of the bundle, and thus secured it so as to prevent the single piece from falling out, it was held that the opinion of a witness that the pipes were properly fastened was not admissible, the matter upon which such opinion was given not being such as to require the opinion of an expert. The court said that "the witness could properly state the relative efficiency of different methods of hoisting the pipe; but when he was asked to state whether it was necessary in the proper performance of a duty, to attach bagging to the end of the pipes, he was asked a question which the jury could determine upon a statement of simple facts." (*New York Electric Co. v. Blair*, 79 Fed. 896, [25 C. C. A. 216].)

In the present case, it will be noted, the witness was not asked how many men would be required to move the shafting properly and with safety; nor (it may be added) was he asked

whether the method adopted for the removal of the shafting was unsafe or characterized by inherent or other negligence. He was, as seen, merely asked if the manner in which it was attempted to remove the shafting as shown by the testimony of the witnesses was the proper way to do the work, which, it is clear (as counsel suggest) involved certain complex operations. And he not only declared that the method adopted was not the proper way of handling the heavy and cumbersome article under the circumstances, but (as an expert should) explained the reasons for his conclusion. In brief, the whole sum of the witness' testimony was the expression of an opinion upon the relative efficiency of different methods of unloading and removing the shafting. (*New York Electric Co. v. Blair*, 79 Fed. 896, [25 C. C. A. 216].)

Counsel for the defendant, Southern Pacific Company, devote considerable space in their briefs in criticism of the alleged refusal by the trial court to grant their client's alleged motion for a nonsuit. But a simple reply to the extended argument addressed to that proposition is to be found in the fact that while it appears that a motion for a nonsuit was made by the corporation, C. L. Best Gas Traction Company, which was joined with the Southern Pacific Company as a party defendant, and the same granted, it nowhere is made to appear in the record that the Southern Pacific Company made any such motion.

The next assignments involve attacks upon certain portions of the court's charge to the jury and upon the action of the court in refusing to allow certain instructions proposed and requested by the defendant.

The first of the given instructions to which objection is made reads: "I instruct you that it is the duty of the master to exercise reasonable and ordinary care to adopt safe rules and methods of work, and that this is a personal duty which the master owes to its servant, and which cannot be delegated or transferred to another in such manner as to relieve it, the master, from responsibility thereof."

That said instruction contains a correct statement of a legal principle in the abstract, there can be no doubt; and we are unable to perceive why it is not a rule which may appropriately be stated in almost any case of personal injuries, where the latter are alleged to have been sustained by a servant through the negligence of his master while such servant

is engaged in the performance of duties the execution of which is attended by more or less danger to the employee.

It has been declared by the text-writers and uniformly held by the courts that "it is the duty of railroad companies to exercise reasonable care in the matter of safeguarding and protecting their employees while engaged in the discharge of their duties as such against the negligence of common employees, or their own negligence through the operation of cars or other machinery, and to that end make, promulgate, and enforce reasonable rules for the government of their employees in the performance of their duties as such." (*Payne v. Oakland Traction Co.*, 15 Cal. App. 127, 144, [113 Pac. 1074, 1081], and the authorities therein cited.) Of course, this rule is applicable only where the master is engaged in a complex or dangerous business, or a business the carrying on of which is, by reason of its intricate character and other conditions, itself dangerous to employees engaged in the work of actually prosecuting it; and, manifestly, whether in any particular case such rules should be made and promulgated must depend upon the nature or character of the business and the conditions necessarily surrounding the prosecution thereof.

But even if this were a case to which the rule above mentioned is not strictly applicable, we yet are unable to perceive in the instruction anything which renders it inapplicable to this case; for, as we read and construe it, the instruction, as before suggested, merely states a principle of law quite pertinent to nearly all cases in which an employee claims damages for personal injuries received while engaged in the performance of work for his employer. There, clearly, can be no doubt that, in any case, it is the duty of the master to use and employ all reasonable precautions for the safety of those in his service, and to that end provide his employees with the safest reasonably available methods and means which may be employed for carrying on the work. (*Bush v. Wood*, 8 Cal. App. 647, 656, [97 Pac. 709]; *Buzzell v. Laconia Man. Co.*, 48 Me. 113, [77 Am. Dec. 212], and cases therein cited.) And this is in effect all that the above instruction declared to the jury. If the word "rules" was omitted from the instruction, no possible question could arise as to the applicability of the instruction to this or (as before suggested) almost any other case of personal injury which was sustained by a servant while prosecuting work assigned to him by his em-



ployer. We cannot see, however, that the use of the word "rules," unaccompanied by a full exposition of the rule requiring in certain circumstances employers to adopt, promulgate, and enforce rules for the guidance of their employees while actually engaged in the discharge of the duties of their employment, makes the instruction say anything more than what it would have imparted to the jury with that word eliminated. What the instruction really means and was undoubtedly intended to convey was, not that it was the duty of the company to promulgate and enforce set rules according to which the unloading of cars should uniformly be carried on (a course which, in its application to work so varied in character, it would at least seem is not feasible or practicable), but that, as to the particular work in hand, because of its rather intricate character, it was the duty of the defendant to furnish its employees employed in the work with proper appliances and to point out the proper method for performing it with safety to themselves. In short, the instruction, justly and rationally construed by the light of the connection in which it is applied, simply means that it is a duty legally resting upon the master to adopt that method for the performance of the particular work which, considering the nature of the work and the circumstances under which it must be performed, will be the less likely to endanger the lives or limbs of the employees engaged in performing it. As so construed, and as no doubt the jury so understood it, the instruction, as before stated, merely declares a general principle applicable to the relations existing between master and servant, and announces one of the general duties owing from the former to the latter. What less than this could reasonably be expected or required of an employer in any case or under any circumstances, we are unable to conceive.

The next complaint of the appellant is aimed at the action of the court in reading to the jury several instructions in which it was stated, in substance, that, if they believed from the evidence that the method adopted for unloading the shafting or bar in question from the car was a perilous one, and "that the perils of the method so adopted were known to defendant's foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plain-

tiff thereof, and if you believe from the evidence that plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant . . . and for the plaintiff."

One of the grounds of objection to the above instruction and others addressed to the same proposition is that thereby the court unqualifiedly and plainly told the jury that the duty to give warning rested on the defendant. It is further claimed that the instructions were wholly inappropriate to this case, since (so it is argued) the danger attending the act of unloading the heavy and unwieldy bar was so obvious that such danger must have been plainly patent to the plaintiff and the other workmen assisting in the work; hence, so it is urged, the instructions must be assumed, and held to have unduly influenced the jury against the defendant.

We are not prepared to acquiesce in the propositions so stated. A reading of the instructions will readily disclose that there exists no tangible ground for declaring that they did not fairly and plainly submit to the sole determination of the jury the question whether the facts were such as to have placed upon the defendant the duty of warning the plaintiff of the perils or hazards of the work in which he was temporarily engaged.

As to the second ground of objection to the instructions, we perceive no necessity for entering into an analysis of the situation as it is presented here to show that the doctrine of warning was, as we believe is true, pertinent to this case. Briefly, we may observe that there are considerations exposed by the evidence upon which the propriety of such instructions in this case may well and reasonably be maintained. The plaintiff, however, relied upon general negligence as well as upon alleged special acts of omission on the part of the defendant which constitute actionable negligence. The verdict is amply supported upon the theory of the general negligence set up in the complaint. Therefore, even if it were true and necessary to declare that warning by the foreman to the employees of certain unexpected perils necessarily arising in such a case, and which perils are obvious to experienced persons, but not so to the one inexperienced in such work, as the evidence shows the plaintiff to have been, was not among the duties legally resting upon the defendant in this case, yet, after an examination of the entire cause, including the evidence, we

cannot justly say that the error in giving the instructions upon that subject, if error it was, has resulted in a miscarriage of justice. (Const., art. VI, sec. 4½.)

Counsel for the appellant concede that no just fault can be found with that portion of the court's charge in which it was declared that, if the C. L. Best Company loaned the plaintiff to the Southern Pacific Company for the special service of unloading the iron bar, and that the plaintiff came under the sole power of control and direction of the latter company, and that plaintiff expressly or impliedly consented thereto, then and in that event the plaintiff for the time being became the servant of said Southern Pacific Company; but they insist that the court erred to the prejudice of their client by refusing to state the converse of that proposition as proposed in their own language. But, as we read the instruction upon that subject as proffered by the Southern Pacific Company, it goes further than merely to state the converse of said rule upon a hypothetical or assumed situation for which there might be support in the evidence. It would have told the jury unqualifiedly and unconditionally that, upon the case as made, the plaintiff was not an employee and under the control of the Southern Pacific Company. Clearly, the instruction as so proposed is inconsistent with the one given, entered upon the domain of fact, and was properly refused.

Objections are urged against some other instructions dealing with other questions arising in the case. To these we deem it unnecessary to give special attention herein; for as to the action of the court with reference to the instructions, it is enough to say generally that we have carefully examined the entire charge of the court and have found that, generally speaking, it states all the principles of law pertinent to the issues with accuracy and clearness. And for this reason there is no ground for holding that the court erred in rejecting certain instructions proposed by the defendant. It is obviously true that a principle or rule of law, pertinent to the issues and once stated, is not required to be repeated in other portions of the charge. The rejected instructions in effect merely embraced a repetition of principles in different forms of language which the court announced and submitted to the jury.

The judgment and the order are affirmed.

[Civ. No. 1821. First Appellate District.—June 8, 1916.]

**FRANK H. POOR, Respondent, v. W. P. FULLER & CO.  
(a Corporation), Appellant.**

**NEGLIGENCE—FALL OF BOX FROM CHUTE—KNOWLEDGE OF DANGEROUS PLACE OF WORK—PLEADING.**—In an action to recover for injuries received from being hit on the back of the hand by a large box falling from a wooden chute which ran from the second to the first floor of defendant's warehouse, while the plaintiff was standing at the foot of the chute catching boxes as they descended thereon, it is not necessary that the complaint allege directly or by implication that the defendant knew or ought to have known of the alleged defects of the place assigned to the plaintiff to work, where it is alleged that the defendant negligently and carelessly, and without due care, directed the plaintiff to work at a place or with an appliance that was not safe.

**ID.—EVIDENCE—CAUSE OF BOX LEAVING CHUTE—OPINION OF PLAINTIFF.**—In such an action there is no error in permitting the plaintiff to give his opinion as to what caused the box to fly off the chute and fall, where the answer of the witness shows that it was his theory that it was due to the bad condition of the chute rather than as to the way the boxes were dropped into it.

**ID.—CONDITION OF CHUTE.**—Testimony that on a prior occasion the chute had shifted and that about fifteen minutes after the accident the legs of the chute were in bad condition, is admissible for the purpose of showing its condition at the time of the injury.

**ID.—DUTY TO FURNISH SAFE PLACE TO WORK—PROPER INSTRUCTIONS.**—In such an action instructions are properly given to the effect that it was the duty of the employer to furnish his employees with a reasonably safe place to work, and with reasonably suitable and safe structures and appliances with which to do the assigned work.

**ID.—FALSE TESTIMONY—DISTRUST OF WITNESS—INSTRUCTION.**—An instruction that if the jury considers that any witness has been false in any part of his testimony, such witness is to be distrusted in the remainder of his testimony, omits two essential elements, viz., the willfulness of the false testimony given and its materiality.

**APPEAL** from a judgment of the Superior Court of San Mateo County, and from an order denying a new trial. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Lilienthal, McKinstry & Raymond, for Appellant.

John D. Willard, John W. Coleberd, and Gilbert D. Ferrell, for Respondent.

**THE COURT.**—This is an appeal by the defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial, in an action for personal injuries.

The injuries to plaintiff for which damages are sought to be recovered were caused, it is alleged, by his being, through the negligence of the defendant, hit on the back of the left hand by a large box falling from a wooden chute which ran from the second to the first floor of defendant's warehouse, while the plaintiff was standing at the foot of the chute catching boxes as they descended thereon. The complaint is in two counts. The theory of the first count is that the wooden chute described in the complaint was an unsafe and insecure appliance with which to do the work to which plaintiff was assigned. It is alleged that the defendant negligently and without due or any care for the safety of the plaintiff did place and maintain a certain wooden chute in an unsafe and insecure position, dangerous to the life, body, and limbs of plaintiff, in failing to secure or fasten in any manner the chute to any thing or object, or to make it stable or stationary in its position; that the defendant caused another of its employees, one Bergmann, to work on the second floor of said warehouse at the upper end of said chute, and there to place heavy wooden boxes in and upon said chute, and send said boxes rapidly and down said chute to the first floor of said warehouse toward the place where plaintiff was working, which said Bergmann carelessly and negligently, and without due or any care for the safety of plaintiff, then and there did; that plaintiff was, while so employed by defendant, negligently and without any care for the safety of plaintiff, ordered and directed to take a place and position near the lower end of said chute, and there to work and receive and remove from said chute the heavy wood boxes sent down said chute, which said plaintiff then and there proceeded to do. Then the complaint alleges that while one of said boxes was descending, the chute shifted from its position, and caused the box to be deflected from the chute in such a way that it fell upon and struck with great force the hand of the plain-

tiff, inflicting the injuries upon and damaging the plaintiff in the manner and in the sum set forth and demanded in the complaint.

The second count of the complaint sets forth by reference all the allegations of the first count, and adds an allegation to the effect that while the box was sliding down the chute, and after the chute had slipped from its position, said Bergmann took hold of and moved the chute, thereby causing the said box to suddenly change the course of its motion, and to be diverted and deflected from the chute in such a way that it fell upon the plaintiff and caused the injuries complained of.

There is no merit in the defendant's first point that the general demurrer to the first count should have been sustained, for the reason that the complaint does not allege "directly or by implication that the defendant, the employer, knew or ought to have known of the alleged defects." The complaint, as we have seen, alleges that the defendant negligently and carelessly and without due care directed the plaintiff to work at a place or with an appliance which was not safe. The defendant could not have been negligent or careless in the respects indicated in the complaint unless it knew or, with the exercise of reasonable diligence should have known, of the defects of the place assigned to the plaintiff to work. Hence it follows that the complaint, at least by implication, alleges that the defendant had knowledge of the dangerous character of the place in which the plaintiff was directed to work.

In the case of *Indianapolis Southern R. Co. v. Wall*, 54 Ind. App. 43, [101 N. E. 680, 4 N. C. C. A. 532], it is said: "In an action to recover for injuries alleged to have been received through defendant's negligence in suddenly starting its train as plaintiff was boarding it, it is not necessary that the complaint allege that defendant failed to stop its train a reasonable length of time to permit plaintiff to board it safely, nor that defendant knew that plaintiff was attempting to board its train when it started it. The allegation that the train was negligently started while plaintiff was boarding is sufficient, and will permit of proof of the reasonableness of the length of the stop, and of defendant's knowledge that plaintiff was attempting to board the train, and that defendant negligently started the train while he was attempting to board it." (See, also, *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161, [22 Am. St.

Rep. 515, 23 N. E. 1021]; *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, [123 Pac. 1086]; *Smith v. Buttner*, 90 Cal. 95, 100, [27 Pac. 29]; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, [47 Pac. 452]; *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691, [105 Pac. 976, 26 Cyc. 1144]; *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, [38 Pac. 411].)

Referring to the second point, apparently it was the theory of the plaintiff, as disclosed in this count, that the injury may have been caused by the act of Bergmann in moving the chute after it had shifted from its original position and while the box which hit plaintiff's hand was descending the chute; but it is not alleged that that act of Bergmann was negligently done; and for that reason the defendant asserts that the second count fails to state facts sufficient to constitute a cause of action, and that therefore the general demurrer thereto should have been sustained.

We think not. If this count was based solely on the alleged act of Bergmann in moving the chute, it may be that this count of the complaint would be deficient in the respect claimed; but, as we have seen, this count embraces all the allegations of the first, the allegations of which as to negligence we have already set forth. Hence it is clear that the second count as a whole upon at least one ground states sufficient facts, and was proof against the general demurrer. (*Hough v. Grant's Pass Power Co.*, 41 Or. 531, [69 Pac. 655]; *Jones v. Iverson*, 131 Cal. 101, [63 Pac. 135].)

Over the objection of the defendant the plaintiff was permitted to answer the question, "what in your opinion caused the box to fly off the chute and fall . . . on July 1, 1912?" The question doubtless called for the opinion of the witness, but it was not objected to upon that ground, nor did the witness in answering it give his opinion, but testified to a fact, for he replied: "The chute slipped and the box fell on to the step." The next question also called for an opinion, and it was objected to on that ground. The question was, "What caused the chute to slip and shift on that occasion?" and the witness answered, "The dropping of the cases on to the chute." If it appeared from this answer that the shifting of the chute came about from the manner in which the boxes were dropped into it, it might perhaps be said that an error of some little prejudice to the defendant had been committed; but the answer does not carry with it any such implication,

and the answer to the next question makes it clear that the witness' idea was that the accident was not caused in that way, for he speaks of the box that hit him as having been placed or laid upon the chute, and not as having been violently thrown thereupon. His theory was, as shown by his examination, in response to a question free from objection, that the chute was in bad condition, and that the box which struck him, while rapidly descending, caused the chute to slip, and was precipitated therefrom.

No error was committed by the court in permitting the plaintiff to describe the immediate surroundings of the place where he was put to work. Such evidence, we think, was admissible under a liberal construction of the issues framed by the pleadings; and it appears that the defendant must have so understood the pleading according to some of the instructions to the jury proposed by it.

The plaintiff was also allowed over objection to testify that on a prior occasion the chute had shifted, and that about fifteen minutes after the accident he observed the legs of the chute to be in bad condition. Questions eliciting this testimony were objected to, but it is clear that evidence of the condition of the place where plaintiff was injured within a reasonable time before or after the accident is admissible for the purpose of showing its condition at the time of the injury. (29 Cyc. 607, 614.)

The court gave a number of instructions at the request of the plaintiff to the effect that it was the duty of the employer to furnish his employees with a reasonably safe place to work, and with reasonably suitable and safe structures and appliances with which to do the assigned work. As before intimated, we think that under the allegations of the complaint and under the evidence introduced, such instructions were properly given; and this is tacitly at least conceded by two instructions given at the request of the defendant. Upon the latter's request the court upon this subject also gave the following instruction: "Under the pleadings in this case you cannot base your verdict in any degree upon any claim of plaintiff that the place in which he was working was unsafe or improper." This instruction was erroneous, and was in conflict with other instructions on the same subject; but as it was given at the request of the defendant and was more favorable to it than it was entitled to have given, it would seem

to follow that the defendant has no good ground of complaint. (*Dennison v. Chapman*, 105 Cal. 447, [39 Pac. 61]; *McNamara v. MacDonough*, 102 Cal. 575, [36 Pac. 941]; *People v. Hower*, 151 Cal. 638, [91 Pac. 507].)

The court refused to give the following instruction: "You are instructed that if you consider that any witness has been false in any part of his testimony, that witness is to be distrusted in the remainder of his testimony." While this proposed instruction conforms to the language of subdivision 3 of section 2061 of the Code of Civil Procedure, still it is not as has been held, a complete exposition of the law, and, to be understood, it requires construction and amplification. It omits two essential elements, viz., the willfulness of the false testimony given and its materiality. In *People v. Plyler*, 121 Cal. 160, at page 163, [53 Pac. 554], the court say: "Defendant proposed the following instruction: 'If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence.' This instruction was modified by the court and thus given: 'A witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others.' As given this instruction closely approximates to the language of subdivision 3 of section 2061 of the Code of Civil Procedure. The subdivision is but a brief paraphrase of the maxim, '*Falsus in uno, falsus in omnibus*.' The code provision, like the latin maxim, is not a complete exposition of the law. Well understood by jurists, it would be misleading to the non-professional mind. It requires construction and amplification. This it has received. (*People v. Sprague*, 53 Cal. 491, 494; *People v. Soto*, 59 Cal. 368.) The proposed instruction is an accurate exposition of its meaning, and should have been given. The charge delivered by the court omits the very important element that the willful false testimony must be upon a material matter."

Moreover, it is settled law that the giving or refusing to give this instruction, unless injury is shown, does not constitute prejudicial error. (*People v. Russell*, 19 Cal. App. 750, [127 Pac. 829]; *Medlin v. Spazier*, 23 Cal. App. 242, 245, [137 Pac. 1078].) In the last case, speaking of a similar proposed instruction, the court said: "Such instruction, however, belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to

know about and act upon in the absence of being instructed thereon. Hence, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground for reversal."

There are other assigned errors; but a careful examination of the record discloses that appellant's contentions with respect to them are without substantial merit, and that the case was fairly tried.

Judgment and order affirmed.

---

[Crim. No. 844. Third Appellate District.—June 5, 1916.]

THE PEOPLE, Respondent, v. HENRY NAN COLLIS,  
Appellant.

**CRIMINAL LAW—MURDER—INTOXICATED CONDITION OF DEFENDANT—INSTRUCTION.**—An instruction in a prosecution for the crime of murder that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in that condition, but, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that *the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act,*" is not erroneous, upon the theory that the plea of "not guilty" interposed by the defendant to the information limited the defense to the sole question as to the commission of the crime by the defendant, and that to have warranted proof of the intoxicated condition of the defendant, it was necessary to set up that fact by way of a special plea.

**ID.—PLEA OF NOT GUILTY—DEFENSES PERMISSIBLE UNDER.**—The plea of "not guilty" to a criminal charge admits of any defense which the facts justify, except those of once in jeopardy and former acquittal or conviction.

**ID.—APPLICABILITY OF INSTRUCTIONS UPON INTOXICATION—EVIDENCE OF DEFENDANT.**—The defendant in such a prosecution cannot contend that instructions upon the subject of intoxication are inapplicable where he himself brings out the fact of his intoxicated condition at the time of the homicide.

**ID.—CONSIDERATION OF EVIDENCE OF INTOXICATION—INSTRUCTION—INFERENCE OF COMMISSION OF CRIME BY DEFENDANT UNWARRANTED.** An instruction that "it is a well-settled rule that drunkenness is no excuse for crime. Insanity produced by intoxication does not de-

stroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, *for when a crime is committed by a party while in a fit of intoxication*, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Such evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution," is not erroneous upon the theory that the italicized portion trespassed upon the domain of fact by declaring that the defendant did the killing.

**APPEAL** from a judgment of the Superior Court of Mariposa County, and from an order denying a new trial. J. J. Trabucco, Judge.

The facts are stated in the opinion of the court.

John A. Wall, L. J. Schino, and B. S. Wilson, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

**HART, J.**—The defendant was convicted of the crime of manslaughter under an information charging him with the crime of murder, and appeals to this court from the judgment of conviction and the order denying him a new trial.

The homicide occurred at a mining camp in Hunter's Valley, Mariposa County, on the fifth day of November, 1915.

The victim of the tragedy, Thomas B. Lynn, and one William Thornton, a resident of Chowchilla, Madera County, were the joint owners of certain mines located in Hunter's Valley. The defendant was employed by them at said mines and worked for them on a percentage basis.

Thornton had not been at the mining camp for some five weeks prior to the date of the homicide, he having been ill during that period at his home in Chowchilla. On the fourth day of November, however, he put in an appearance at the camp. He, the defendant and the deceased were the only persons present at the time of the shooting. Thornton claimed to have seen the defendant shoot Lynn, and from his testimony, as given at the trial on behalf of the people, the following facts relative to the homicide are gleaned:

Upon arriving at the camp on the morning of the 4th of November, Thornton observed that Lynn and the defendant had been drinking heavily. He further discovered that there were not sufficient provisions in the house for their then present purposes, and thereupon proposed to the defendant that they (defendant and himself) go to Pleasant Valley and Jasper Point, in said county, and at those places purchase groceries and such other articles as were then needed at the camp. The defendant agreed to this, and the two accordingly left the camp together for the places above named, one carrying a rifle and the other a shotgun, with which they might kill any game which they might run across. On the way to those points the defendant told the witness of trouble he had had with the deceased. He said to Thornton that the deceased had annoyed him greatly in his (deceased's) talk on Socialism, with which subject the latter appears to have been obsessed, and that he (defendant) "thought two or three times that he would have to kill him." The two finally arrived at Pleasant Valley, and Thornton, having purchased some supplies, which included four quart bottles of whisky, started on his return to the camp, accompanied by the defendant. Upon their arrival at the camp they and the deceased and one James Young, who had called at the camp, proceeded to drink the liquor, with the result that all of them became more or less intoxicated, the defendant getting so drunk that by 12 or 1 o'clock he was required to take to his bed. Thornton, however, had previously gone to bed, and testified that, while in bed, and before the defendant had retired, he heard a heated argument going on between the latter and the deceased.

On the fifth day of November the deceased arose quite early and went to Jasper Point, a distance of three miles from the camp, for the purpose of getting mail. He returned at about 8 o'clock in the morning, but later in the day again went to Jasper. In the meantime, the defendant remained at the camp and in his bed, being greatly under the influence of liquor.

The deceased returned to the camp from his second trip to Jasper at between the hours of 5 and 6 P. M. At this time, Thornton was sitting on a chair on the outside of the house and about fifteen feet to the left of the front door of the house. The defendant, with no other clothing on but his

shirt, suddenly appeared at the door and inquired: "Where is Lynn?" to which Thornton replied: "There he comes from Jasper," whereupon the defendant exclaimed, "I am going to shoot him." Immediately following the threat the defendant raised and aimed a gun at Lynn and fired. Lynn made a loud exclamation and said to the defendant: "Happy, Happy" (the defendant was familiarly known as and called "Happy"), "don't shoot no more—you have hit me." Thornton sprang from his chair and said, addressing the defendant, "What do you mean, Happy?" to which the latter rejoined, addressing Thornton, "You s—n of a b—h, I will shoot you." The defendant, who was still at the door and a little inside the house, then brought his weapon around as if to fire another shot. Thornton started to get out of range and had taken only a few steps when the gun was again discharged. "I would like to say that before that," testified Thornton, "I heard the shell hit the floor inside the house, so I knew the gun was loaded, so I beat it. I do not suppose I got over sixty yards until the gun went off the third time. I did not stop any more. I did not see any more than the first shot. The second and third shots I did not see. . . . I fell just as it went off the third time. I kept on. I thought I would go and have him arrested. I heard a voice singing over on the road. I went across the mountain and kept hollering for him and he did not answer me." Upon reaching the road, Thornton met a gentleman named Williams, to whom he imparted information of the shooting and requested him to go to a store near by and telephone for the sheriff or constable. The constable at Hornitos, in said county, was finally reached and apprised of the shooting, and, accompanied by two or three other persons, immediately started for the scene of the shooting, arriving there late at night. They found the dead body of the deceased lying on the ground a short distance from the point where he stood when shot, there being physical evidence that the body had been dragged from the one point to the other.

After their arrival at the camp, and before the defendant was aware of their presence there, the constable and his party saw the defendant leave the house and go to the spot where lay the body of Lynn and, by the aid of a lighted match or a light otherwise produced, apparently view or look at the body. He was heard at this time to say, speaking to a dog

which was with him and barking, "Show me, show me Thornton—I am going to kill the s—n of a b—h."

The defendant was later arrested and positively denied, as he did at the trial, shooting Lynn or knowing by whom he was shot.

An inquest held by the coroner of the county into the cause of the death of Lynn developed that death had been produced by gunshot wounds. One of the bullets "entered the right chest six and one-half inches from the shoulder, two and one-half inches from the center of the chest, and came out ten inches from the top of the left shoulder, and five inches to the left of the spinal column, the center of the back." Another bullet entered the left thigh ten inches from the center of the knee-cap and came out two inches below where it entered.

There is, as will later be perceived, no just ground for a serious claim that the verdict is devoid of sufficient support. Indeed, since the evidence upon its face is by no means improbable, there exists no ground for the support of such a claim.

The theory of the defense at the trial was that Thornton and not the defendant committed the crime. There was an attempt at sustaining that theory, and (it may be added) a few circumstances presented which might well be regarded as tending to support it. But the jury did not accept that theory, evidently being convinced that Thornton's version of the homicide was true. The verdict, upon the record as presented before us, is final and conclusive upon this court.

It is claimed, however, that the court committed prejudicial error by the giving of the following instructions:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in that condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that *the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.*

"It is a well-settled rule that drunkenness is no excuse for crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms



no defense whatever to the fact of guilt, *for when a crime is committed by a party while in a fit of intoxication*, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Such evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

The above instructions were based upon and the first substantially in the language of section 22 of the Penal Code.

It is contended: 1. That instructions upon intoxication are wholly inapplicable to this case, since (so it is claimed) the defendant's condition for sobriety or inebriety on the occasion and at the time of the shooting was only incidentally brought into the case and not for the purpose of mitigating the offense or reducing the crime to the lesser degree or grade thereof or of acquitting the accused; 2. That the instructions trespassed upon the domain of fact in that they in effect declared that the defendant committed the act of killing the deceased.

The objections thus urged against the instructions are untenable.

The argument in support of the first of the propositions above stated appears to be based upon the theory that the plea of "not guilty" interposed by the defendant to the information limited the defense to the sole question whether the defendant actually committed the act of destroying the life of Lynn, and that, to have warranted proof of the intoxicated condition of the defendant, at the time of the homicide, it was necessary to set that fact up by way of a special plea. This, we say, seems to be the theory of the argument, or, at any rate, is the necessary effect thereof. Of course, there is absolutely no basis in law for any such notion.

The plea of "not guilty" to a criminal charge admits of any defense which the facts justify, except those of once in jeopardy and former acquittal or conviction. Self-defense, the plea of insanity, or the plea that the accused was not guilty of any connection whatever with the commission of the crime may be introduced under the general plea of "not guilty."

That the instructions were applicable to the case at bar, we think the record clearly and unquestionably shows. Counsel for the defendant themselves brought out the fact

of the defendant's intoxicated condition on the occasion and at the time of the homicide. They brought out the fact not only by and through the defendant himself, by questions directly propounded to him and addressed to that subject. but also by and through the witness Young, who testified on behalf of the defendant. What their special motive or purpose was in proving the fact, it is not material to inquire or necessary to ascertain. The fact remains that they did introduce proof that the defendant was greatly under the influence of intoxicating liquor at the time of the homicide, and, therefore, the instructions complained of and the principle therein announced were peculiarly applicable to the case and most properly given to the jury.

The second ground of objection to the instructions arises from the language thereof which we have put in italics. By that language, it is claimed, as above stated, that the court invaded the function committed by the constitution exclusively to the jury in that it involved an instruction upon a question of fact and virtually said to the jury that the defendant committed the crime charged in the information. But the instructions are not reasonably susceptible of the construction so given them, and are, therefore, not obnoxious to the objection to which they would be amenable were that construction maintainable.

The instructions, as only a cursory examination of them will readily attest, merely involve a statement in abstract form or in a general way of the rule as to the drunkenness of one charged with the commission of a crime at the time of the commission thereof as it is laid down by section 22 of the Penal Code, *supra*. They, in other words, only abstractly declare what the rule of law is upon the satisfactory proof of facts of an indicated nature. Nowhere therein is it declared that the facts to which the instructions would be pertinent were proved, nor do they directly refer to the accused or intimate that he committed the crime charged.

Instructions based upon said section of the Penal Code have often been given in language substantially, if not precisely, the same as that in which the challenged instructions are framed and have been uniformly approved by the higher courts. Indeed, we are not able to perceive how the rule could be stated intelligently in materially different language. Nor can we understand how the jury, in view of the other

instructions read to them, could have obtained such a conception of the meaning of the instructions as counsel's construction of them would give to them. The jury must be assumed to have been composed of men of good common sense, and that they must have fully and clearly understood the duty resting upon them from the instructions which, in plain and unmistakable language, told them that they were the sole and exclusive judges of the credibility of the witnesses and the effect and probative value of the testimony; that a defendant was at all times and until a verdict was reached to be presumed to be guiltless of the crime charged or of any crime or degree of crime therein involved, and that a verdict of conviction would be justified only after they were convinced from the evidence to a moral certainty and beyond all reasonable doubt of the defendant's guilt. Surely, with the law as thus stated before them, the jury could not have understood the instructions on intoxication as involving a statement by the court that the defendant had committed the crime charged or the act of slaying the deceased.

Counsel say that the verdict demonstrates that Thornton's testimony was discredited and, indeed, wholly disregarded by the jury, and that, therefore, the defendant probably would not have been convicted but for the instructions given. The argument is that Thornton's was the only testimony presented in the case tending in the slightest measure to connect the defendant with the commission of the crime; that it showed the killing to have been deliberate, wanton, and without cause or provocation; that, if true and believed, the testimony warranted no other verdict than that of murder of the first degree. The argument, in its application to the instant case, is wholly destitute of force or merit. As shown, there was evidence of the intoxicated condition of the accused at the time the homicide was committed. The jury could, therefore, have consistently believed the story of Thornton in its entirety and at the same time, under the instructions complained of here and the evidence addressed to the intoxicated condition of the defendant, have justly concluded that the verdict reached and returned by them was the proper one. Indeed, inasmuch as there was no other evidence than Thornton's testimony tending in any degree whatever to establish the defendant's guilt, we may properly assume that the jury believed Thornton, and would have found the ac-

cused guilty of one of the degrees of the higher offense but for the instructions here challenged.

There are no other points presented in the case.

The judgment and the order are affirmed.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1916.

---

[Civ. No. 1505. Third Appellate District.—June 5, 1916.]

GEORGE P. LOVEJOY, as Administrator, etc., Appellant, v.  
BLAIR HART et al., Respondents.

**GIFTS OF MONEY—ACTION TO SET ASIDE—INSUFFICIENCY OF EVIDENCE.—**

In this action to have two certain gifts of money, made by a deceased person in her lifetime to a friend with whom she made her home for many years, set aside on the ground of mental incapacity and undue influence, it is held that the plaintiff failed to establish any sort of trust or fiduciary relation between the parties; or that the gift was secured by undue influence exercised over the donor; or that she was mentally and physically incompetent or in any degree incapable of managing her own affairs or comprehending the nature of the transaction by which she parted with all her property, or that she needed independent advice.

**APPEAL** from a judgment of the Superior Court of Sonoma County. Thomas C. Denny, Judge.

The facts are stated in the opinion of the court.

Fred S. Howell, and W. D. L. Held, for Appellant.

J. W. Ford, and Thomas J. Geary, for Respondents.

CHIPMAN, P. J.—Plaintiff, as administrator of the estate of Ann La Point, deceased, brought the action to have two certain gifts of money made by deceased in her lifetime set aside and decreed invalid, null, and void.

The complaint is an elaborate statement of facts alleged on information and belief, in which is alleged a conspiracy entered into by defendants to induce the deceased to leave her husband, and representations are alleged to have been falsely and fraudulently made by defendants to deceased with the object of disrupting her marital relations with her husband and to arouse in her a sentiment of hatred toward and dislike of her husband, and that by reason thereof deceased was induced to leave her husband; that this fraudulent conspiracy had for its object the procurement from deceased the money she possessed, and that the gifts made to defendant Martha Hart by deceased were brought about through said conspiracy; that deceased was an old woman, feeble in mind and body and in poor health, and that her mind was perturbed and deranged thereby, "and that defendants poisoned the mind of deceased against her husband by representing that her husband would cheat her of her money"; that deceased was addicted to the use of alcoholic liquors, particularly beer, and consumed them in such quantities as seriously to affect her mind and understanding and incapacitate her for the management of her or any business; that, about March 1, 1895, defendants, by their said corrupt and fraudulent conspiracy and while deceased was residing with her then lawful husband, enticed decedent away from her said husband and induced decedent to live with them; that, on or about March 23, 1895, and while decedent was residing with defendants, decedent "did make a purported gift of the sum of \$3,761.09 to the defendant Martha Hart, without any consideration whatever from said Martha Hart or from any other person or persons;" that at said time decedent was of the age of sixty-five years, "and that at said time decedent was feeble in mind and body, ignorant, and in weak health, and that her mind was perturbed and deranged thereby, and she was easily susceptible of influence and prejudice," and said gift "was procured and obtained by the defendants fraudulently and corruptly combining and conspiring together;" that said gift was the result of undue influence exercised upon decedent "by defendants fraudulently and corruptly combining together," and that, at the time she made said gift, decedent "was not free from duress, menace, fraud, and undue influence, but was in fact subjected to duress, menace, fraud, and undue influence by

and on the part of defendants, both corruptly and fraudulently combining and conspiring together;" that at the time she made said gift decedent was not of sound mind.

In a second and separate cause of action a gift by deceased to defendant Martha Hart of nine hundred dollars, on or about July 15, 1907, represented by a certificate of deposit in a Petaluma bank, is alleged. The alleged facts leading up to said gift are much the same as in the first cause of action. It is also alleged "that by reason of the foregoing facts and the domestic relation existing between decedent and defendants, a confidential and fiduciary relationship existed between decedent and defendants at all times while decedent resided with defendants aforesaid."

The court found against plaintiff in respect of all the accusatory charges alleged in the complaint affecting the conduct and motives of defendants. The following findings are all that seem necessary to be stated:

"V. That on or about the 23rd day of March, 1895, while said decedent was residing with the defendants the said decedent made a free and voluntary gift of the sum of \$3,761.09 to defendant Martha Hart.

"VI. That at the time said gift was made decedent was of the age of 65 years or thereabouts; that at said time decedent was not feeble in mind or body, or ignorant, or in weak health, and her mind was not perturbed or deranged and she was not easily susceptible of influence or prejudice, and was at said time of sound and disposing mind. . . .

"VIII. That the mind of said decedent did not become biased, poisoned or prejudiced against her said husband by reason of any representations or statements made to said decedent by the defendants or either of them; that the said decedent did not avoid meeting her said husband and did not at any time refuse to see or talk with him; that decedent was not at any time under the control, dominion, or undue influence of the defendants, or either of them; that at no time while the said decedent resided with defendants was she ignorant, or weak in mind or body. . . .

"XI. That on or about the 15th day of July, 1907, while decedent was residing with defendants, the said deceased duly indorsed and delivered to defendant Martha Hart a good and valid certificate of deposit payable to the order of decedent and drawn on the William Hill Bank of Petaluma,

California, for the sum of \$900. That said certificate of deposit was a gift from decedent to Martha Hart; that on the 15th day of July, 1908, defendant Martha Hart duly cashed said certificate of deposit at the Petaluma National Bank for the full sum of \$900.00.

"XII. That at the time said certificate of deposit was indorsed and delivered to defendant Martha Hart, as a gift, decedent was of the age of 77 years, or thereabouts; that at said time, or at any other time said decedent was not feeble in mind or body, or ignorant, or in weak health, and decedent was not at any time stupefied, or her mind perturbed or deranged by the daily or other use and consumption of alcoholic liquor, commonly known as beer, and she was not at any time easily, or at all susceptible of influence or prejudice. . . .

"XV. That at the time said gift was made, and at all other times, said decedent was of sound mind. . . .

"XVII. That decedent was not on the 23rd day of March, 1895, or at any other time under the control, dominion or influence of defendants, or either of them; that at said time decedent was of the age of 65 years or thereabouts; that decedent was not weak in mind or body, or ignorant in business or financial matters; that the mind of said decedent was not at any time subsequent to the 23rd day of March, 1895, nor for a long time, or any time prior thereto benumbed or stupefied by the daily or long continued use of alcoholic liquor, commonly known as beer, or any other intoxicating liquor; that decedent was not made incompetent thereby, or at all; that no confidential or fiduciary relationship existed at any time between decedent and defendants, or either of them; that at the time said gift was made the acts, deeds or conduct of decedent pertaining to her business or financial matters were not guided, influenced or controlled by the defendants, or either of them; that no position of trust, confidence or superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

As conclusions of law the court found that both said sums were gifts freely and voluntarily made, and judgment passed accordingly. Plaintiff appeals from the judgment on bill of exceptions.

On this appeal, plaintiff, in his brief, states that "actual fraud, sufficient of itself, and standing alone, to avoid the gifts in question, has, perhaps, not been shown here." It



is further stated: "We are seeking the application of those equitable principles which forbid one standing in a superior and dominant position from benefiting by the act of him who bestows confidence and trust in the donee; which forbid one while standing in the position of a guardian or protector, the fruits of transactions with his ward, or dependent, to his own financial gain. The confidence and trust which exist between such persons must ever remain inviolate," etc. It is quite manifest that the grounds now urged for a reversal of the judgment depend upon the truth of the assumption that a fiduciary and confidential relation of trust and confidence existed between defendants and Mrs. La Point, and hence it was incumbent upon defendants "to show affirmatively and clearly that their transactions" with Mrs. La Point "were conducted fairly, openly, and that no undue advantage has been taken" of her. It will at once be seen that the premise from which appellant draws his conclusion is that a fiduciary relation of confidence and trust existed between the parties concerned. The court found that such relation did not exist. No natural or artificial relation existed from which that of confidence and trust might arise by implication or presumption—such as *cestui que trust* and trustee, parent and child, husband and wife, guardian and ward. These persons, the La Points and Harts, had been neighbors and friends for several years prior to 1895; Mrs. Hart visited Mrs. La Point frequently and enjoyed the friendship and esteem of the latter to a greater extent, perhaps, than other of her neighbors. Mr. Hart had no business relations with La Point or his wife, and had no occasion or inducement to sustain other than the ordinary relationship existing between neighbors. There was no evidence that would have justified the court in finding the existence of what in the mind of a chancellor or in the contemplation of law or equity would be regarded as a relation of trust and confidence such as appellant seeks to attribute to these persons. Nor do we think that the subsequent conduct of the Harts and Mrs. La Point, as shown by the evidence, would have warranted the court in finding otherwise than it did—"that no confidential or fiduciary relationship existed at any time between decedent and defendants or either of them; . . . that no position of trust, confidence or

superiority of mind or intellect over said decedent was ever held or exercised by defendants, or either of them."

It appeared that, in February, 1895, Ann La Point and her husband were living on a small place at Lakeville, Sonoma County, which belonged to Ann as her separate property and upon which her husband had conducted a road-house or saloon for a number of years. They were married in 1875. They lived together until March 1, 1895, when Mrs. La Point went to the home of the defendants and took up her residence with them, and so remained until about March 19, 1912, when she died intestate, having lived with defendants seventeen years. There was testimony as to the cause of her having left her husband which, among other grounds, tended to show that he had diverted his affection from his wife and bestowed it upon another woman. Mrs. Hart testified: "She came to me in her trouble and told me she was afraid of her life, and she says, 'Fred [her husband] has driven me out of my home.' And for that reason, she says, 'I have no roof over my head,' and I says, 'You have one now,' and she says, 'Yes,' and I says, 'Well, stay under it,' and that is all I had to say. She came there crying; an old lady sixty-five years old." La Point testified: "I did not sleep in the old house occupied by my wife during the last year before she left, and not more than two or three times during the last two years. I spent most of my spare time in my brother's house, listening to my sister-in-law [his alleged affinity] reading. I lived at Lakeville about two or three weeks and at Petaluma for one year after my wife left me, and I made no effort to get into communication with her. My sister-in-law and I went off on several trips together; we went hop-picking once for about three weeks. That was not the cause of the trouble between my wife and I. I went to British Columbia with my sister-in-law and my brother and was gone about two and a half years. I did not write to my wife while I was gone nor to anyone else at Lakeville to inquire about my wife. I felt that if she was satisfied to call it quits I was. . . . From the time I returned from British Columbia in 1899 down to the time of my wife's death, about a year ago, I never saw her to speak to her. I made no effort to see her. I was perfectly satisfied to let her live as she was living if she would let me alone. I made no effort to ascertain if she was being cared

for or not. I do not know how the Harts were treating her. I did not go to my wife's funeral because I did not feel like it. She was buried at Petaluma and I was living at Petaluma at the time." He testified that he had a policy for two thousand dollars payable to his wife, but, in 1894, he had it made payable to his sister and nephew. "I had the policy changed because I knew my wife had plenty, and she wouldn't give me any of her money and I didn't intend she should have any of mine. My wife was pretty stubborn, when she made up her mind I could not change it."

It was shown that, on March 23, 1895, Mrs. La Point caused her credit account of \$3,761.09 in an Oakland savings bank to be transferred to Mrs. Hart, and, on July 15, 1907, she assigned to Mrs. Hart a certificate of deposit calling for nine hundred dollars in a Petaluma bank, which Mrs. Hart cashed. There was testimony as to the drinking habit of deceased prior to leaving her husband, the purpose being to support the charge that her excessive use of intoxicants weakened her mind and body and rendered her incompetent. The testimony was conflicting on this point, but we think the testimony justified the finding of the court already noted. This testimony related to a period before she left her husband, and while it may have had a bearing upon her condition when the first gift was made, there was no evidence that she was addicted to the use of intoxicants to excess, or at all, for that matter, after she went to live with the Harts, and hence had no bearing upon her condition in 1907, twelve years later, unless the alleged effect of her early alleged intemperance continued, and this is not shown. Testimony as to the mental condition generally of Mrs. La Point was introduced and some witnesses testified that she was "simple" and that her conversation was "childish" or "child-like." Several witnesses who had known her for many years intimately, both before and after she went to the Hart's home, testified that she was perfectly sound in mind. The court so found on sufficient evidence. There was testimony also that while living with the Harts she appeared "to be happy and contented," and that her affection for the Harts and theirs for her was mutual.

There was but little testimony as to the circumstances immediately attending these gifts, and what there was came from Mrs. Hart, whose testimony was taken at the instance

of plaintiff in the matter of the estate of Ann La Point, deceased, and was used at the trial. Speaking of the first gift, she testified that when Mrs. La Point made the transfer she asked Mrs. Hart to go with her to Oakland, and told her she wanted to give her her money. "She said, 'I want to give you my money, Mattie,' she says, 'I want you to go with me; I want to give you my money.' Q. Did she say anything else? A. No, she wanted to give me her money. . . . Q. What did she ever say about that money that she left? A. Five years ago she told me, she said, 'Mattie, I want you to have my money; I don't want Fred or his people to have one dollar that I have; I want you to have it.' Q. Did you ever have any discussion with the deceased, Mrs. La Point, in regard to board and keeping? A. No. Q. You did not expect to keep her for nothing until she died, did you, Mrs. Hart? A. I never thought of anything like that; she came to me in her trouble and told me she was afraid of her life and, she says, 'Fred has driven me out of my home.' " It appeared that Mrs. La Point sold the place where she and her husband had formerly lived and some time later, July 15, 1907, she assigned the certificate of deposit to Mrs. Hart. This was all the property she had left after her gift of the deposit in the Oakland bank. The property brought nine hundred dollars. Mrs. Hart testified as to this nine hundred dollars: "Q. Wasn't it understood that that money was to be used for her expenses and board? A. No, she never said one thing as to what I was to do with her money. It was used for her funeral expenses and fixing up the cemetery, that money she gave me." She testified: "Q. Did she ever consult you and act on your advice in any matter? A. Any matters? Q. Her business matters. A. Her troubles? Q. No, in her family affairs; her business matters. A. No, not her business matters. She didn't have any business matters, only she wanted to give me her money; that's the only business matters. . . . Q. Didn't she say she wanted you to have this money when she died? A. She never said 'died'; she said she wanted me to have the money. . . . Q. Had she been turned out of your house she would have been penniless? A. No, she would not; she would not have been turned out of our house, in the first place. Q. I am assuming that she would. A. Well, she would never have been turned out; if anything would have happened to

me my husband would have looked out for her; and if anything would have happened to him my children would have looked out for her. My children looked to her just the same as if she were a relative; she came to us when they were tiny. . . . Q. As far as you ever noticed or observed she was perfectly capable of handling her own affairs and did not require anyone's advice; is that a fact? A. Yes, sir. . . . Q. And her mind was perfectly bright and clear? A. Oh, yes; bright and clear until the day she died. . . . Q. How long have you known Mrs. La Point, how many years? A. Let's see,—oh, I guess 33 or 34 years. Q. And you have been friendly all that time? A. Oh, yes; the best of friends. The Court: She was no relation to you? A. No; just old friends."

It does not seem necessary to pursue the evidence further. Appellant failed to establish any sort of trust or fiduciary relation between the parties; or that the gift was secured by undue influence exercised over the donor; or that she was mentally or physically incompetent or in any degree incapable of managing her own affairs or comprehending the nature of the transaction by which she parted with all her property, or that she needed independent advice. She lived in apparent happiness and contentment with defendants for seventeen years, and was cared for as one of the family. If, as is claimed, "in stripping herself of every dollar she had without any consideration," she did an improvident and unusual act, this alone carries no implication of fraud, undue influence, or incompetence. She had a right to do what she pleased with her own. She probably, on the score of long friendship, believed that she would find a home with defendants as long as she might live, and was willing to give her money to Mrs. Hart in this belief, and the facts show that if such was her motive she was not disappointed. But, whatever her motive, we find no facts or circumstances surrounding the transaction which impeach the validity of the gift.

The judgment is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1916.

[Civ. No. 1459. Second Appellate District.—June 7, 1916.]

**CATHERINE STEINBRONER, Respondent, v. GEORGE  
P. STEINBRONER, Appellant.**

**ACTION FOR DIVORCE—DECREE OF FOREIGN STATE—LACK OF JURISDICTION—NONRESIDENCE—DEFENSE.**—In an action for divorce a defense based upon a decree dissolving the marriage in a foreign state antedating the action cannot be sustained where the law of the foreign state provided that the applicant must be a *bona fide* resident of the state for the period of one year immediately preceding the bringing of the action, and it was found that the parties were during said time nonresidents of the state.

**Id.—JUDGMENT OF FOREIGN STATE—WANT OF JURISDICTION—COLLATERAL ATTACK.**—Jurisdiction of a court of a foreign state to render a judgment is always open to collateral attack in a proceeding in another state, and the record of the judgment in the foreign state may be contradicted as to the fact necessary to give the court jurisdiction.

**APPEAL** from a judgment of the Superior Court of Los Angeles County, and from an order granting alimony *pendente lite*. Charles Munroe, Judge.

The facts are stated in the opinion of the court.

John Munro, and Fay R. Robertson, for Appellant.

Joseph Scott, and A. G. Ritter, for Respondent.

**SHAW, J.**—Action for divorce. Judgment went for plaintiff, from which, and an order of court granting plaintiff alimony *pendente lite*, defendant appeals.

As disclosed by the record and argument in appellant's brief, the only ground upon which he based his defense to the action was a decree of the court of common pleas of the commonwealth of Pennsylvania, together with an exemplified copy of the record therein, all of which were duly presented at the trial, showing that at a time antedating the commencement of this action, the bonds of matrimony theretofore contracted between plaintiff and defendant, as alleged herein, had been dissolved and a divorce granted him from said plaintiff by said decree so rendered by the common pleas court of Crawford County, Pennsylvania.

As to this defense, however, the court found that, under the laws of Pennsylvania existing at the time, it was necessary in order to vest the court with jurisdiction to entertain an action for divorce, that the applicant therefor be at the time of commencing the suit a *bona fide* resident of such state, as well as such resident for a period of one year immediately preceding the bringing of such action; that defendant herein, who was plaintiff in the action so instituted in the Pennsylvania court, was at the time of the institution thereof, and for more than a year immediately preceding its commencement had been, a resident of the state of California, in which state defendant also resided. No attack is made upon this finding; indeed, we understand the facts so found to be conceded by appellant. As a conclusion of law, the court found that the decree so rendered and entered by the common pleas court of Pennsylvania granting defendant a decree of divorce from plaintiff, was null and void for want of jurisdiction.

Appellant's sole contention is that, since the judgment rendered by the court of common pleas was regular on its face, it was not subject to collateral attack. In support of this claim he cites numerous authorities to the effect that "a divorce by a court having jurisdiction, valid and conclusive in state where rendered, is conclusive everywhere, and a finding of residence by the state court is *prima facie* proof and sufficient until overcome to support the jurisdiction." (*Cheever v. Wilson*, 9 Wall. 123, [19 L. Ed. 604].) Undoubtedly this is true, provided the court *has*, as stated in the text, *jurisdiction*; but that is the very question here involved and as to which, as said, the decree presented is "*prima facie* proof and sufficient until overcome to support the jurisdiction." Since the evidence is not brought up, we must assume that it was ample to support the finding made by the court that there was a want of jurisdiction in the court rendering the decree, and this overcomes the *prima facie* showing made by its presentation. Mr. Black, in his work on Judgments, section 822, says: "In America it is generally held, and indeed almost universally, that as a proceeding in divorce is intended to affect the status of the parties, and is therefore essentially *in rem*, the judgment pronounced, whether in a foreign country or in a sister state, by a court having *lawful jurisdiction* of the cause, and in

the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided the applicant was *bona fide domiciled within the territorial jurisdiction* of the court, although the other party, being a nonresident, was notified only by advertisement or some other species of constructive service" (italics are ours); the theory being that the marriage relation is a status transitory in its nature and attached to the person of each of the contracting parties, so that a court, having jurisdiction over the one may dissolve it as to both, notwithstanding the other is beyond such jurisdiction. In *Dunham v. Dunham*, 162 Ill. 589, [35 L. R. A. 70, 44 N. E. 841], quoting from the syllabus, it is said: "An action for divorce is to some extent a proceeding *in rem*, and, where jurisdiction over the person of the defendant is not obtained, a court can deal with such status only by the fact that the plaintiff is in good faith domiciled within its territory, and thereby entitled to invoke this jurisdiction." And further: "A decree of divorce, when pleaded in a court of another state, may be attacked for want of jurisdiction in the court which rendered it, and where the action in which it was rendered was *ex parte*, and it is clearly proven that the plaintiff was not at the time a *bona fide* resident of the state in which it was brought, such decree will be held void." The case of *Thompson v. Whitman*, 18 Wall. 457, [21 L. Ed. 897], is authority for the statement that the jurisdiction of a court of a foreign state to render a judgment, is always open to collateral attack in a proceeding in another state, and that "the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction." To the same effect is *Hall v. Lanning*, 91 U. S. 160, [23 L. Ed. 271], where it is said: "The jurisdiction of a foreign court over the person or the subject matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another state is to be regarded as a foreign court. . . . The record of such a judgment does not estop the parties from demanding such an inquiry." In the case of *In re James*, 99 Cal. 374, [37 Am. St. Rep. 60, 33 Pac. 1122], the supreme court, in discussing the question, says: "We agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it

jurisdiction to proceed, did not exist; and this is true, although the record sought to be impeached may recite the existence of such jurisdictional facts." Appellant has cited numerous authorities holding that a domestic judgment cannot be attacked collaterally in the courts of the state rendering the judgment; and also authorities like the text cited from *Cheever v. Wilson*, 9 Wall. 123, [19 L. Ed. 604], to the effect that where the court having jurisdiction renders a valid and conclusive judgment, its action is conclusive everywhere. But these authorities have no bearing upon the question here presented. Both plaintiff and defendant were residents of this state at the time when and for more than one year immediately prior to defendant instituting the suit in Pennsylvania, wherein he obtained the judgment interposed as a bar to plaintiff's action. As the status which he sought to have destroyed attached to the person of the contracting parties, neither of whom was within the jurisdiction of the Pennsylvania court, it must follow that such court had no jurisdiction of either the person of the litigants or of the subject matter of the action; and hence the purported decree interposed as a bar to this plaintiff's action was a nullity.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1980. Second Appellate District.—June 7, 1916.]

F. W. HUNT, Appellant, v. ANDREW GLASSELL,  
Respondent.

**PLEADING—AMENDMENT—SAME CAUSE OF ACTION—STATUTE OF LIMITATIONS.**—If the cause of action stated in an amended complaint is a new and totally different one from that stated in the original complaint, the amendment does not relate back to the beginning of the action so as to stop the running of the statute of limitations; but if the amendment is one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint.

**Id.—PROMISSORY NOTE — PLEADING — AMENDED COMPLAINTS — SAME CAUSE OF ACTION.**—In an action on a promissory note, where the original complaint demanded judgment upon a certain promissory

note for a certain sum with a certain date and payable one year after date, an amended complaint was afterward filed setting forth a note of the same date and amount as before and in like terms, except that it read ten months after date instead of one year, and omitted the provision for interest contained in the note set out in the original complaint, and a second amended complaint alleged the execution of the note in the same terms as the note set out in the first amended complaint, and alleged further facts showing that at the time of the commencement of the action plaintiff was unable to see the note or obtain a copy thereof, and was obliged to rely upon his recollection of its terms, but that he had seen the note about the date it was made, and alleging that there was but one note for the amount claimed made by the defendant at the date alleged, and that the note sued on in the second amended complaint was the same incorrectly set out in the original complaint; *held*, that the cause of action set out in all the complaints was the same, and the second amended complaint related back to the time of the filing of the action so as to stop the running of the statute of limitations.

**ID.—PLEDGE OF NOTE—PAYMENT OF PRINCIPAL DEBT—LIABILITY FOR BALANCE OF PLEDGED NOTE.**—Where the maker of a promissory note secures possession of it from one to whom it is pledged, with his knowledge, to secure payment of a smaller note, by paying only the amount of the claim of the pledgee therein, leaving a balance unsatisfied on the larger note, the owner of the note is entitled to recover against him for the unpaid balance.

**ID.—PLEDGE OF PROMISSORY NOTE—RIGHT OF PLEDGEE.**—A pledged promissory note is not property subject to sale by the pledgee; he has only the right to collect it when due, and, under the circumstances, no transaction could take place between the maker of the larger note and the pledgee which would put the maker in any better position with respect to the pledged note than that of the pledgee, where the general property of the note still remains in the payee.

**ID.—SETTLEMENT OF CLAIM SECURED BY PLEDGE—WHEN PLEDGOR NOT BOUND.**—The contention that, because an action by the pledgee of the promissory note to recover upon it was against the pledgor as well as the maker of the note, and the second amended complaint in this action on the pledged note alleges that, after answer filed, the defendant "settled the said cause of action by then and there paying to said plaintiff in said action" an amount about equal to the principal of the note secured by the pledge, the inference follows that the settlement was made with the pledgor as well as with the pledgee, and the pledgor consented to the surrender of the note to the maker, cannot be maintained, where it is further alleged that the payment was made on the note secured by the pledge and to settle all claim that the pledgee had as security.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Murphey & Poplin, for Appellant.

J. E. Hannon, for Respondent.

CONREY, P. J.—By his original complaint in this action, filed on December 15, 1911, the plaintiff, as successor in right to Duquesne Brewing Company, a corporation, demanded judgment upon a certain promissory note for the sum of ten thousand dollars, dated September 25, 1907, and payable one year after date. On June 3, 1913, the plaintiff filed an amended complaint setting forth a note of same date and amount as before and in like terms, except that it read “ten months after date” instead of one year after date, and omitted the provision for interest contained in the note set out in the original complaint. A demurrer to the amended complaint having been sustained, the plaintiff, on the thirty-first day of July, 1913, filed his second amended complaint, and therein alleged the execution of a note in the same terms as the note set out in the first amended complaint. The second amended complaint states facts showing that at the time of commencement of this action the plaintiff was unable to see the note or obtain a copy thereof, and was obliged to rely upon his recollection of its terms, plaintiff having seen the note at about the date it was made; alleging also that there was but one ten thousand dollar note made by defendant to Duquesne Brewing Company of date September 25, 1907, and that the note sued on herein, as shown in the second amended complaint, is the same note sued on and by mistake incorrectly set out in the original complaint.

The second amended complaint further shows that during the year 1909 the Duquesne Brewing Company made and delivered to A. K. Martel a note for two thousand five hundred dollars, which note was afterward sold by Martel to Fidelity Investment Company, a corporation; that when the two thousand five hundred dollar note became due the Duquesne Brewing Company, in consideration of forbearance of the holder of that note, pledged to Fidelity Investment Company the Glassell note of ten thousand dollars as collateral security for said Martel note; that on June 24, 1909, the

Fidelity Investment Company commenced an action on the ten thousand dollar note against Glassell and Duquesne Brewing Company, and Glassell, as defendant in that action, filed an answer and the case was set down for trial; that prior to any trial being had therein, and on or about May 10, 1910, "said defendant, Andrew Glassell, settled the said cause of action by then and there paying to said plaintiff in said action about the sum of twenty-five hundred dollars"; that said payment was made as a payment on said ten thousand dollar note and to settle and pay all claim and demand that Fidelity Investment Company had in or to said ten thousand dollar note as security for the payment of said Martel note; that thereupon Fidelity Investment Company, plaintiff in that action, transferred and delivered to Andrew Glassell, defendant therein, both of said notes, and ever since that time he has been in possession and control of the same; that Glassell at and prior to the time he made said settlement knew that said ten thousand dollar note made by him to Duquesne Brewing Company was held as collateral security for the Martel note and for no other purpose; and well knew that the only interest that Fidelity Investment Company had in the ten thousand dollar note was to the extent of two thousand five hundred dollars, with interest on said smaller sum; that the defendant Glassell received said note in trust for the Duquesne Brewing Company and has held the same in trust for the use and benefit of the Duquesne Brewing Company and its assigns ever since that time.

On October 5, 1909, Duquesne Brewing Company was adjudged a bankrupt. Thereafter, after proceedings duly had as recited in the second amended complaint herein, the trustee in bankruptcy of the said bankrupt's estate, duly authorized therefor, sold at public auction certain assets of the estate, including said ten thousand dollar note and the plaintiff, F. W. Hunt, became the purchaser thereof. That the sale having been duly approved and confirmed, the trustee assigned and transferred to plaintiff all right, title, and interest of the estate of Duquesne Brewing Company in and to said note. The plaintiff has demanded from defendant that defendant surrender possession to him of the note, and also has demanded payment of said note by defendant to the plaintiff, all of which has been refused.



The defendant demurred to the second amended complaint upon the grounds that it did not state facts sufficient to constitute a cause of action against the defendant, and upon the further ground that the cause of action as shown upon the face of the complaint appears to be barred by the provisions of section 337 of the Code of Civil Procedure. That demurrer having been sustained, judgment was entered in favor of the defendant, and this appeal is by the plaintiff from that judgment. The appeal is presented upon the judgment-roll and a bill of exceptions.

If the cause of action stated in the present complaint is a new and totally different cause of action from that stated in the original complaint, the amendment does not relate back to the beginning of the action so as to stop the running of the statute of limitations. *Lambert v. McKenzie*, 135 Cal. 100, [67 Pac. 6], is one of many decisions declaring the rule. But if the amendment be one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint. (*Redington v. Cornwell*, 90 Cal. 49, [27 Pac. 40]; *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, [142 Pac. 910].) The facts contained in the present record, and which in substance we have stated, are sufficient to show that in this action the plaintiff at all times has been seeking to recover judgment upon one and the same note, and that there has been no change in identity of the subject matter constituting his cause of action. It follows that the second amended complaint was not subject to demurrer under the claim that it was barred by limitations.

Appellant claims that according to the allegations of his complaint it is shown that the defendant, well knowing that Fidelity Investment Company held the Glassell note in its possession solely as a pledge securing the smaller note which we have called the Martel note, obtained possession of both notes by paying to the pledgee an amount not more than sufficient to satisfy the pledgee's interest therein; the amount so paid being only a fractional part of the indebtedness due from him to the pledgor of the larger note. If the settlement so made by Glassell was with the pledgee and under the circumstances to which we have referred, it must be that a balance remains due and unsatisfied on the Glassell note, and that such balance is due to the plaintiff as successor to

Duquesne Brewing Company. The pledged note was not property subject to sale by the pledgee; he had only the right to collect it when due. (Civ. Code, sec. 3006.) Under the circumstances here appearing, no transaction could take place between Glassell and the pledgee which would put Glassell into any better position with respect to the pledged note than that of Fidelity Investment Company which held it in pledge. The general property in the note still remained in the payee, Duquesne Brewing Company. (*Cross v. Eureka Lake etc. Canal Co.*, 73 Cal. 302, 306, [2 Am. St. Rep. 808, 14 Pac. 885]; *Cushing v. Building Assn.*, 165 Cal. 731, 737, [134 Pac. 324].)

In support of his claim that the second amended complaint does not state a cause of action, respondent's counsel argues that the demurrer should be sustained because it is shown that the action commenced by Fidelity Investment Company was against the pledgor, Duquesne Brewing Company, as well as against Glassell; and that since it is alleged that after the answer had been filed by Glassell, the defendant "settled the said cause of action by then and there paying to said plaintiff in said action about the sum of twenty-five hundred dollars," this is sufficient to raise the inference that the settlement was made with the pledgor as well as with the pledgee, and that the pledgor consented to the surrender of the note. On examining the complaint we find it further alleged that the payment by Glassell was made as a payment on the Duquesne Brewing Company's note and to settle and pay all claim and demand that the pledgee had therein as security for the payment of the Martel note. It is not made to appear that Duquesne Brewing Company had appeared in the action or in any manner participated in the settlement. Indeed, the settlement was made after the adjudication of bankruptcy. The court should not by a strained construction attempt to supply the allegation of a fact not stated in a complaint in order to hold that the complaint does not state a cause of action. Assuming that we might give full effect to the rule supported by authorities cited by respondent, that a compromise made with the consent of the pledgor is binding upon him, and therefore upon subsequent assignees of the pledgor, we think that such rule is not properly applicable to the complaint now under consideration.

We are of the opinion that the demurrer to the second amended complaint in this action should be overruled, and for that reason the judgment is reversed, with directions to the court below to proceed accordingly.

James, J., and Shaw, J., concurred.

---

[Civ. No. 1425. Third Appellate District.—June 7, 1916.]

DEMETRA BRUSCHI, Appellant, v. IDA B. COOPER  
et al., Respondents.

**IRRIGATION ACT—CERTIFICATE OF SALE AND DEED—ERRONEOUS RECITAL OF NAME OF PERSON ASSESSED—VOID DEED.**—A certificate of sale and a tax deed made pursuant to proceedings had under the Irrigation Act of 1897 (Stats. 1897, p. 254) are both invalid under the provision of section 35 requiring the assessment-book to specify the name of the person assessed, section 45 requiring the certificate of sale to state the name of the person assessed, and section 48 requiring that "the matter recited in the certificate of sale must be recited in the deed," where the name of the person assessed appeared on the assessment-book as "D. Bruschie," and in the certificate and sale as "D. Bruscia."

**ID.—NAME OF PERSON ASSESSED—RECITAL IN DEED.**—The provision of section 48 of the Irrigation Act that "the matter recited in the certificate of sale must be recited in the deed" includes the "matter" that the deed shall contain the name of the person assessed, when known.

**ID.—TAX DEED AS CONCLUSIVE EVIDENCE—POWER OF LEGISLATURE.**—While the legislature can make a certificate of sale or tax deed conclusive as to matters which are in their nature nonessentials, it has not the power to make such documents conclusive as to any of the essentials of listing, valuation, apportionment or notice.

**ID.—TAXATION—LISTING OF LAND FOR ASSESSMENT—STATEMENT OF NAME OF OWNER.**—The listing of land for assessment necessarily means that the name of the owner, if known, and a description of the property assessed must be "correctly stated."

**ID.—TAX DEED AS CONCLUSIVE EVIDENCE—PROCEEDINGS INCLUDED.**—The provision of section 48 of the Irrigation Act making the tax deed conclusive evidence of the regularity of all the proceedings from the assessment to the deed means all the proceedings other than those as to which the deed by said section is made *prima facie* evidence.

**ID.—DATE OF SALE—MISRECITAL IN CERTIFICATE—EFFECT OF.**—Under section 45 of the irrigation law providing that the collector must make out in duplicate a certificate dated on the day of sale stating (when known) the name of the person assessed and the time when the purchaser will be entitled to a deed, a certificate of sale dated March 3, 1906, instead of February 20, 1906, the day of sale, is not void, where it is stated therein that the property may be redeemed within twelve months from the former date, which is stated as the date of sale.

**APPEAL** from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge.

The facts are stated in the opinion of the court.

**J. R. Webb, and George Cosgrave, for Appellant.**

**W. H. Hatton, and Hatton & Scott, for Respondents.**

**CHIPMAN, P. J.**—This case was before the court and decided January 29, 1916, reversing the judgment of the lower court. A rehearing was granted and further light on the case invited, particularly upon the validity of the assessment, certificate of tax sale, and the tax deed involved in the action. In discussing the questions presented we found what seemed to us a very close analogy between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. Following the decisions of the supreme court as we understood them, we were constrained, with some reluctance, to hold the title asserted by defendants to be invalid. In reviewing the opinion heretofore filed in the case, respondents contend, first, that section 35 of the Irrigation Act (Stats. 1897, p. 254) does not require that "the property must be assessed to the owner." The section does provide that the assessor "must prepare an assessment-book with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) the name of the person to whom the property is assessed (if the name is not known to the assessor the property shall be assessed to 'unknown owners.' . . . " The assessment was made not "to unknown owners" but to a person named, viz., D. Bruschia. How far a mistake in the name may

affect the validity of the assessment need not now be considered. The fact is that the owner's name was given.

Second. It is urged "that section 45 of that act does not absolutely require that the certificate of sale must state the name of the person assessed. Said section 45 requires the collector to make out in duplicate a certificate dated on the day of sale, stating (when known) the name of the person assessed, etc." We have seen that the assessment was not to "unknown owners" but to a person named D. Bruschie, presumably believed by the assessor to be the owner. In making out his certificate the collector gave the name of the person to whom the property was assessed as D. Bruscia. It is claimed that the statute expressly makes the naming of the person assessed "subject to the condition that the assessor knows the name of the persons assessed." This may be so where the assessment is to "unknown owners," but where an owner is named in the assessment and is named in the certificate, it cannot be said that it was the case where the person was unknown.

Third. It is contended that "the irrigation act does not require that an irrigation tax deed issued thereunder 'shall correctly recite the name of the person to whom the property was assessed, as a condition of its validity,' " as held in the former decision. Section 47 provides: "If the property is not redeemed within the time herein provided, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate," etc. It is true that the statute does not in terms require that the name of the person assessed must be recited in the deed, neither does it require a description of the property to be given, but we held, at the former hearing, that, in requiring the deed to recite "substantially the matters contained in the certificate," the name of the person assessed should be regarded as among the substantial matters to be recited if the name in fact did appear in the certificate.

We fail to discover, upon a re-examination of the statutory provisions relating to the subject, any satisfactory grounds on which to reach a conclusion different from that expressed in our former opinion. And we therefore adopt that opinion, which is as follows:

"This is an action, as set forth in plaintiff's second amended complaint, to quiet the title of plaintiff to lots 28, 29, 30, 31, and 32 in block 33 of the city of Modesto, Stanislaus County. An amendment was, by leave of court, made to the amended complaint stating that 'should the court find that defendants or either of them had expended money in payment of taxes or assessments on said property and are justly entitled to reimbursement of the same then plaintiff is ready, willing, and able to pay . . . such sum as the court may find that they are entitled to and offer to pay the same and to do equity in the premises.'

"Defendant Williams answered: Denied generally and specifically the averments of the said complaint; alleged that the cause of action is barred by sections 318, 319, and 322 of the Code of Civil Procedure; and, as a separate defense, alleged that prior to the commencement of the action defendant was and he still is the owner in fee of the said lots; that, on February 20, 1906, said lots 30 and 31 were sold to satisfy the tax levied on said property last referred to by Modesto Irrigation District for the year 1905, which said tax had become delinquent; that at said sale M. L. Cooper became the purchaser and, no redemption having been made, a deed of conveyance to said two lots was, on March 4, 1907, made to said Cooper, 'conveying to said M. L. Cooper absolute title to said real property'; that, on May 6, 1910, said M. L. Cooper conveyed said two lots to his wife, Ida B. Cooper, and, on December 26, 1911, said Ida conveyed the same to defendant Williams, and ever since said date he has been the owner of said real property. Similar averments in said answer are set forth as to lots 28, 29, and 30, defendant Williams thus deraining title thereto.

"As a further defense it is set forth that plaintiff is precluded or estopped from instituting or maintaining this action for the following reasons: That, on December 26, 1911, said property was conveyed to defendant by good and sufficient deed for a good and valuable consideration; that since said date 'said defendant, at great cost and expense, to wit, about nine thousand dollars, has erected and built upon said premises a large and expensive building' and has made other improvements on said real property amounting to one thousand dollars; that plaintiff 'was fully cognizant of the erection of said building on said premises at the time said

building was in course of erection, and until and long after the said building was erected and completed, plaintiff made no claim to the ownership of said property or any part thereof'; like averments are made as to said improvements other than said building; that had defendant known or had he been informed that plaintiff made any claim to or interest in said property defendant would not have made said improvements; that, by reason of the foregoing, plaintiff 'intentionally endeavored to perpetrate and by instituting this action is now willfully, knowingly, and intentionally endeavoring to perpetrate a fraud upon said defendant to his loss in the sum of not less than fifteen thousand dollars.'

"For a further defense, that plaintiff is estopped from maintaining the action for the following reasons: That plaintiff is guilty of laches in that he 'abandoned said real property . . . and for many years prior to the commencement of the action, failed and refused to pay any taxes or assessments whatever levied upon or assessed against said property, . . . and that said real property and the whole thereof has frequently been sold for taxes,' and that plaintiff purposely refrained from paying said taxes for the purpose of attempting to defraud the purchaser at any sale of said property for delinquent taxes; that plaintiff was well aware of all said assessments and sales of said property; that following said sales certificates of purchase were duly issued with plaintiff's full knowledge and conveyance made without protest or objection by plaintiff.

"By way of cross-complaint, defendant sets up the facts first above stated as to the sale and purchase of said property for delinquent taxes and also pleads adverse possession by himself and predecessors in estate.

"Defendants Ida B. Cooper, Z. E. Drake, and F. E. Johnston answered: Denied plaintiff's alleged ownership; alleged ownership in defendant Williams on December 26, 1911, at which time he, said Williams, conveyed the south sixty feet of said property by deed of trust in which said Williams was party of the first part, the said Drake and Johnston parties of the second part, and defendant Ida Cooper party of the third part, to secure to said Cooper the payment of two thousand dollars and other sums, no part of which has been paid, and said deed of trust is a lien on said property and is in full force and effect.

"Defendant The Modesto Savings Bank denied plaintiff's ownership and alleged ownership in defendant Williams; it also set up a deed of trust by Williams, on the east eighty feet of the property, to secure a loan of two thousand dollars.

"Plaintiff answered the cross-complaint of defendant Williams: Denied the alleged adverse possession and denied that defendant Williams or his grantors or predecessors in interest have paid all or any taxes or assessments levied on said property; denied that plaintiff has no right, title, or interest in said property or that plaintiff's claim is without right.

"The court made findings in favor of defendants: That at the commencement of the action plaintiff was not and is not now the owner of said property or any part thereof or any interest therein, and is not entitled to the possession thereof; that the alleged cause of action in plaintiff's second amended complaint is not barred by either section 318, 319, or 322 of the Code of Civil Procedure; that, prior to the commencement of the action, defendant Williams was and now is the owner in fee simple of said property. The court found further: That on February 20, 1906, the whole of said property 'was by the collector of Modesto Irrigating District sold to satisfy the assessment or tax levied and imposed on said real property by Modesto Irrigating District for the year 1905, which said assessment or tax had become and was delinquent at the time of said sale, said lots Nos. 30 and 31 of said block No. 33 in said city of Modesto being assessed and sold as one parcel to M. L. Cooper, and lots Nos. 28, 29, and 32 in said block No. 33 in said city of Modesto being assessed and sold as a separate parcel to said M. L. Cooper,' and said Cooper became the purchaser of all said lots; that thereafter, on March 3, 1906, the said collector made out in duplicate a certificate stating name of the person to whom said property, to wit, lots 30 and 33, were assessed, a description of the land sold for assessment, giving the amount and year of assessment, and specifying the time when the purchaser, said Cooper, would be entitled to a deed; that said certificate was signed by said collector and a copy delivered to said purchaser and a copy filed in the office of the county recorder of Stanislaus County. Similar finding was made as to lots 28, 29, and 32; that, immediately after the delivery by said collector of said certificates to said purchaser, he, the said purchaser, entered into the actual possession of the whole of

said real property and took actual possession thereof and claimed the same and thereafter and up to March 4, 1907, 'continuously and actually occupied, possessed, and publicly claimed said real property and the whole thereof as his property'; that said claim and possession was under said certificate of sale during the period from March 3, 1906, to March 4, 1907, 'and prior to the erection of the building hereinafter mentioned the whole of said premises was entirely uninclosed.' It is also found that said Cooper had like possession of said land claiming the same openly and notoriously from March 6, 1906, to May 6, 1910, and, during all said period, paid all the taxes and assessments levied or assessed against said property, and that no part of said property was redeemed from said sales, and that, on March 4, 1907, a deed of conveyance was made by said collector to said Cooper conveying said lots 30 and 31, and on said day a deed was also made to said Cooper by said collector covering said lots 28, 29, and 32, conveying to said Cooper absolute title to all said lots; that said certificates of sale were duly issued, delivered, and recorded, as were also the said deeds of conveyance, 'without any objection on the part of plaintiff'; that, on May 6, 1910, said M. L. Cooper conveyed all said property to his wife, Ida B. Cooper, who thereupon entered into actual possession of said property and, ever since said date and up to December 26, 1911, continued to occupy and possess said property openly and notoriously, and adversely during said period collected the rents, issues, and profits of said property, and paid all taxes levied or assessed against the same; that, on December 26, 1911, said Ida B. Cooper conveyed all said real property to defendant O. H. Williams for a good and valuable consideration, and ever since said date Williams has been and now is the owner in fee of all said property; that said Williams, on said date, entered into possession of said property and ever since said date has been in open and notorious possession thereof under claim of right and has paid all taxes levied and assessed against said property; that neither plaintiff nor any other person except said L. M. Cooper, Ida B. Cooper, and said Williams 'was or were in the possession of said real property or any portion thereof within more than five years before the commencement of this action'; that said occupation and possession 'was under claim of title by said O. H. Williams, M. L. Cooper, and Ida B. Cooper based upon

said certificates and said deeds of conveyance and exclusive of any other right and hostile to any right, title, or claim or right of possession of plaintiff, his grantors or ancestors'; that said Williams purchased said property in good faith and paid therefor the sum of four thousand dollars; that, since December 26, 1911, said Williams has erected on said premises a building which cost about nine thousand dollars and has made other improvements thereto amounting to one thousand dollars; that plaintiff has made no attempt to pay any of said taxes 'but has at all times been able, ready and willing to pay the same.' The court finds the averments of the answer respecting said loans, secured as alleged, to be true.

"Judgment was accordingly entered quieting defendant Williams' title to the property. Plaintiff appealed from the judgment under the alternative method.

"That the government title to the lots in question vested in Francisco Bruschi, father of plaintiff, by deed of Charles Crocker, November 8, 1882, seems not to be controverted. On January 1, 1883, Francisco conveyed lots 28, 29, and 32 to Dimetra Bruschi. The name 'Dimetra' may be said to mean the name 'Demetra' and would, in our opinion, fall within the rule *idem sonans*. The identity of name carries with it the identity of person. (Code Civ. Proc., sec. 1963, subd. 25.)

"As to lots 30 and 31, plaintiff claims as heir and as a distributee under the will of Rosa Bruschi, his mother. By the decree of May 27, 1905, in the estate of Francisco Bruschi, lots 30 and 31 were distributed to Rosa. The decree of distribution in her estate recites that 'the residue of the estate, consisting of the property hereinafter particularly described, is now ready for distribution'; names certain nine heirs, among them a son, Demetrio M. Bruschi, and devises in equal shares 'the residue of said estate of Rosa Bruschi, deceased, hereinafter particularly described and now remaining in the hands of said administratrix, and any other property not now known or discovered which may belong to the said estate.' The property particularly described is \$112.20 in money and a promissory note of \$547.06. Plaintiff was shown to be the son and hence an heir at law of Rosa. We think it sufficiently appeared that he had a one-ninth interest in lots 30 and 31 which were devised to Rosa and of which the decree

of distribution in her estate made no disposition except under the clause 'any other property not now known.'

"Upon the question of estoppel pleaded, no fact is found except that said certificate of sale and said tax title deeds were issued 'without any objection on the part of plaintiff,' which is not in itself sufficient to establish an estoppel. Plaintiff offers in his complaint 'to pay to defendants or either of them such sum as the court may find that they are justly entitled to and offers to pay the same and to do equity in the premises.' There is no finding as to what payment plaintiff should make to defendants in the event of plaintiff's succeeding in the action or what the court would deem equitable—whether such payment should include all taxes and cost or the improvements made upon the lots, or both. The court found for the defendant Williams and it was not necessary to deal with this feature of the case.

"If the findings may be construed as showing title in defendant Williams by adverse possession, they are not supported by the evidence. The period of five years after the execution and delivery of the tax deed had not elapsed before the action was commenced, although it had elapsed if the date of the certificate of sale may be considered. However, the lots were not inclosed until about the time the building was erected on them by Williams in 1911; they had been used as a dumping ground for sand and storage of some loose personal property by a man who paid Williams a rental for such use, but otherwise there was no occupancy of the lots. There was no evidence showing what portion of the lots was thus used, even if such use could be regarded as occupancy, which we do not think would be so regarded. (Code Civ. Proc., sec. 322; *Cohen v. Anderson*, 22 Cal. App. 634, [135 Pac. 1096].) Defendant's claim that he held under color of title by virtue of the certificate of sale cannot be sustained, for a certificate of purchase issued at a tax sale does not constitute color of title. (1 Cyc. 860, 1099.) There must be an apparent transfer of title. (1 Am. & Eng. Ency. of Law, 859, 973; *Packard v. Moss*, 68 Cal. 123, [8 Pac. 818]; *Salt Lake Investment Co. v. Fox*, 32 Utah, 301, [125 Am. St. Rep. 865, 13 L. R. A. (N. S.) 627, 90 Pac. 564], where the court said: 'The fact that Moon went into possession under and by virtue of the tax sale certificate was, in effect, an admission on his

part that he held the property subject to the owner's right of redemption.')"

"The court found against defendants on their plea of the statute of limitations.

"It seems to us that the judgment must stand or fall upon the strength of the title of defendant Williams derived through the tax proceedings which were taken under the act of March 31, 1897 (Stats. 1897, p. 254).

"Appellant relies upon the following points for reversal: 1. Insufficiency of the assessment; 2. Invalidity of the certificate of sale; 3. Insufficiency of the deed made pursuant to the sale.

"The assessment is attacked on the grounds: (a) That the assessment levied to pay the general expenses of the district is not segregated from the assessment to pay annual interest on outstanding bonds; (b) that noncontiguous lots are not separately assessed.

"The assessment was made pursuant to the authority of the above-mentioned act. Lots 28, 29 and 32 were assessed to D. Bruschie and lots 30 and 31 to F. Bruschie, and in each case the assessment was of the group of lots and not separately; also, the valuation was made on each group as a whole and not separately. As we have reached the conclusion that the certificate of sale and the deed of the collector of the district to defendant Williams are invalid, we refrain from passing upon the objections raised to the assessment.

"Section 48 of the act is relied upon by defendants as validating any and all the tax proceedings under which they claim. The construction given this section by the supreme court may as well be shown here as elsewhere. After stating that certain matters recited in the certificate of sale 'must be recited in the deed,' and that 'such deed duly acknowledged or proved is *prima facie* evidence of such matters,' the section reads: 'Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all encumbrances, except when the land is owned by the United States, or this state, in which case it is *prima facie* evidence of the right of possession.'

"This conclusive evidence clause is the same as is found in section 3787 of the Political Code, except that the word 'other,' just before the word 'proceedings' is omitted in section 48 of the Irrigation Act. The supreme court, in *Escondido High School Dist. v. Escondido Seminary*, 130 Cal. 128, [62 Pac. 401], said: 'If it were necessary to pass upon the question in this case, it might consistently with recognized rules of construction be held that the language used in the act of 1887 (the language is the same in the act of 1897) means all the proceedings other than those as to which the deed is made *prima facie* evidence, and the act would thus be relieved from the constitutional objection in support of which appellants cite copious authorities.' The court did not find it necessary to decide the question, but we do not hesitate to hold that the section means what is thus, at least inferentially, said it does mean. Otherwise, construed literally, the deed is made *prima facie* evidence of certain seven enumerated things and conclusive evidence of the same things, as well as all others. The deed is made *prima facie* evidence that '(a) the property was assessed as required by law; (b) that the property was equalized as required by law; (c) that the assessments were levied in accordance with law; (d) the assessments were not paid; (e) at a proper time and place the property was sold as required by law; and by the proper officers; (f) the property was not redeemed; (g) the person who executed the deed was the proper officer.'

"In *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 239, 240, [90 Pac. 936], the scope of the conclusive evidence clause is defined. Section 3680 of the Political Code provides that upon all bills or statements there must be stamped the words 'sold for taxes' and the date of sale. In the case before the court this memorandum was not made, and it was urged that this provision was intended as notice required to be given the owner, and a failure to give it deprived him of his property without due process of law. The court said: 'Of course it is true that the legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pp. 355, 356; 1 Blackwell on Tax Titles, sec. 640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the legislature might not have required to be done, and which are in their nature,

therefore, nonessentials. But there is nothing in the law which makes the giving of such a notice essential—no rights of the taxpayer would be violated if such a provision for notice were not required at all. . . . It is quite within its power to do away with this provision or as here, to hold that the tax deed shall be conclusive evidence that it was given.' (See *Smith v. Furlong*, 160 Cal. 522, 527, [117 Pac. 527].)

"The invalidity of the certificate of sale is urged: (a) because it is not dated on the day of the sale; (b) it does not specify when the purchaser will be entitled to a deed; (c) it does not give the name of the person assessed. The certificates are identical in substance. Taking the certificate of the sale on the assessment to D. Bruschie, it states that the property, describing it, was duly assessed as required by law, by the proper officers of said district and for the purposes thereof, in the year 1905; that the name of the person so assessed was D. Bruscia; that said property was equalized as required by law; that the assessments were levied in accordance with law and the amount of the assessment is the sum of \$8.16 and the year of the assessment 1905; that 'the assessments were not paid; that at the proper time and place, after all due and legal proceedings heretofore had, I did, on this twentieth day of February, 1906, offer the said real estate (describing it, being lots 28 and 29) for sale for said assessments'; that M. L. Cooper became the purchaser. 'Said property may be redeemed within twelve months from the date of said purchase, viz., this twentieth day of February, 1906, by the person and in the manner as provided by law and if the property is not so redeemed, said purchaser will, on or after said expiration of twelve months from the date of sale and purchase and after having complied with the provisions of the law relating to his right thereto be entitled to a deed.' The certificate then states that a description of the land as in the certificate has been entered in a book kept as a record by said district known as volume 1, Certificate of Sale, which description is numbered 809 on the margin and is put on this certificate as the number thereof.

" 'In witness whereof I have signed this certificate, and filed a duplicate thereof in the office of the county recorder of the said county of Stanislaus, in which said land sold is situated, this third day of March, 1906. G. R. Stoddard, Collector of Modesto Irrigation District.'

"Section 45 of the act of 1897, among other things, provides that 'the collector must make out in duplicate a certificate dated on the day of sale stating (when known) the name of the person assessed . . . and specifying the time when the purchaser will be entitled to a deed.' The certificate was made out in duplicate but was dated March 3, 1906, instead of February 20, 1906, the day of the sale. But it clearly appears in the certificate that the sale was made on February 20th, for it is twice stated and it as clearly therein appears that the 'property may be redeemed within twelve months from the date of said purchase, viz., this twentieth day of February, 1906,' and if not so redeemed, 'said purchaser will, on or after the expiration of twelve months from the date of sale and purchase, and after having complied with the provisions of the law relating to the right thereto be entitled to a deed.' The certificate gives the name of the owner of the assessed property as D. Bruscia. The name of the owner in the assessment-roll is D. Bruschie. One of the objects of the certificate doubtless is to give notice to the owner of the date of the sale and to inform him when the purchaser will be entitled to a deed, i. e., inform him of the period of redemption. We think the purpose of the statute in this regard is fully met by the statement found in the body of the certificate. (*Best v. Wohlford*, 153 Cal. 20, 21, [94 Pac. 98].) The Idaho Revised Codes, section 1759, provides that after receiving the amount of the taxes and costs from the purchaser at tax sale the collector must make out in duplicate a certificate dated on the day of sale. In *McGowan v. Elder*, 19 Idaho, 153, [113 Pac. 103], the tax sale was on July 8, 1904, and the certificate was dated July 9, 1904. The Idaho supreme court held it good and that the provision of the statute is directory and not mandatory. The decision of this point does not, as appellant contends, rest upon the provision of the statute that no assessment is illegal on account of informality.

"The objection to the deed is the same as one of the objections to the certificate of sale—that the party assessed is 'D. Bruschie,' whereas the name of the person assessed as given in the certificate and deed is 'D. Bruscia.' Section 35 of the Irrigation Act requires the assessor of the district to assess all the real property of the district to the persons who

own the same. 'He must prepare an assessment-book, with appropriate headings, in which must be listed all such property within the district, in which must be specified under the appropriate head: (a) The name of the person to whom the property is assessed; . . . ' Section 45 requires the assessor in his certificate of sale to state the name of the person assessed. Section 48, among other things, states that, 'The matter recited in the certificate of sale must be recited in the deed.' Just how much of the matter and what particular matter 'must be recited in the deed' the statute does not inform us. It does not in terms require that the deed shall contain the name of the person assessed. But the statute requires that the name of the person assessed should appear on the assessment-roll and also in the certificate of sale. It would seem reasonable to hold that 'the matter' referred to in section 48 includes the name of the person assessed. The point now before us being raised on both the certificate of sale and the deed, it may be considered in connection with both.

"Appellant relies upon *Henderson v. De Turk*, 164 Cal. 296, [128 Pac. 747]. In that case defendant claimed solely upon a deed from the state based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as 'E. W. Davis,' while the assessment was to 'E. W. Davies.' Section 3785 of the Political Code provided that the deed must recite, among other things, 'the name of the person assessed.' It was held that 'this means, of course, the name of the person assessed as it appears on the assessment-roll,' and that a deed which 'misrecites or fails to recite any one of the facts required by statute to be recited therein is void.' It was also held, on the authority of *Emeric v. Alvarado*, 90 Cal. 444, 465, [27 Pac. 356], that the rule of *idem sonans* does not apply 'to assessments and other cases of description, where the written name is material.' It was further held, in the *Henderson v. De Turk* case, that the failure of the deed to recite correctly the name of the party assessed is not remedied or cured by either the section 3807 or 3628 of the Political Code, because section 3628 refers only to the assessment which is not rendered invalid by reason of a mistake in the name of the owner. Section 3807 provides: 'When land is sold for taxes correctly imposed as the property of a particular per-

son, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable.' Of this section the court said: 'It does not purport to apply to the deed made in pursuance of the sale . . . and cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition to its validity.' Finally, it was held that section 3787 of the Political Code 'makes such a tax deed evidence of regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law. The deed relied upon was held to be invalid.

"Turning to the Irrigation Act, we find, as already pointed out, that section 35 makes it the duty of the assessor to assess all real property at times stated. 'He must prepare an assessment-book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (a) The name of the person to whom the property is assessed (if the name is not known, . . . to unknown owners); (b) land (describing it) . . .' On the last day of December of each year, 'all unpaid assessments are delinquent,' etc. (Sec. 41.) Sections 42 and 43 provide how the delinquent tax sale is to be conducted and who may purchase, etc. Section 45 provides for issuing a certificate of sale to the purchaser: 'After reciting the amount of assessments and costs, the collector must make out in duplicate a certificate dated on the day of sale, stating (when known) the name of the person assessed,' etc., and section 46 provides that, before delivering any certificate, the collector 'must in a book enter a description of the land sold, corresponding with the description in the certificate, the date of sale, purchasers' names, and amount paid,' etc., but does not require to be entered in this book the name of the person assessed, as does the certificate. Section 47 provides how and when redemption may be made, and section 48 provides that if the property is not redeemed, the collector 'must make to the purchaser, or his assignee, a deed of the property' and 'such deed duly acknowledged or proved is *prima facie* evidence that'—then follow the seven several facts thus made *prima facie* evidence, and the conclusive evidence clause already quoted. Section 50 is the same

as section 3807 of the Political Code mentioned in *Henderson v. De Turk*, 164 Cal. 296, [128 Pac. 747]. We thus find a very close parallel between the general code provisions for assessments and delinquent tax sales and the provisions of the Irrigation Act. The property must be assessed to the owner (sec. 35); the certificate of sale must state 'the name of the person assessed.' (Sec. 45.) 'The matter recited in the certificate of sale must be recited in the deed.' (Sec. 48.)

"As to section 50, which is the same as section 3807 of the Political Code, the case cited holds that it 'cannot be held to dispense with the requirement that the deed shall *correctly* recite the name of the person to whom the property was assessed, as a condition of its validity.' As to the conclusive evidence provision, holding it to mean, as we do, the same as the like provision in the Political Code (sec. 3187), the court said, in the case cited, that said section 'makes such tax deed evidence of regularity of such proceedings as are named therein *only* when it is a deed conforming to the requirements of the law,' that is to say, in the case then before the court, conforming to the requirement that the deed must correctly recite the name of the person to whom the land was assessed.

"We are brought to the single consideration—Is the requirement in the certificate of sale and in the deed that there must appear therein 'the name of the person assessed'—such an essential in the proceedings as could not be dispensed with by the legislature, or may it be classed as a nonessential and subject to the rule laid down in *Bank of Lemoore v. Fulgham*, 151 Cal. 234, [90 Pac. 936], where it was held that the legislature can make the certificate or deed conclusive as to matters or things which in the first instance the legislature might not have required to be done, and which, in their nature, therefore, are nonessentials? It was said, in the case cited, that the legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of listing, valuation, apportionment, or notice. (Cooley on Taxation, pp. 355, 363; Blackwell on Tax Titles, sec. 640.) What is meant by 'listing' the land? Mr. Cooley says: 'An assessment consists of two processes of listing the persons, property, etc., to be taxed, and of extending the sums which are to be the guide in an apportionment of the tax between them.' (1 Cooley on Taxation, p. 596.) Mr. Black says: 'Statutes

generally require that real property shall be listed and assessed to the owner or to the occupant; and it is generally admitted that this requirement is imperative and a compliance with it essential to jurisdiction.' (Black on Tax Titles, sec. 105, citing *State v. Vanderbilt*, 33 N. J. L. 38, where it was held that real estate must be assessed in the name of some person or persons or corporation, as the owner thereof.)

"It seems to us that the 'listing' of land for assessment necessarily means that the name of the owner, if known, and a description of the property assessed must be stated and, as was held in the *De Turk* case, 'correctly stated.' In the present case, the assessment was to 'D. Bruschie.' The certificate of sale and the deed recited the name as 'D. Bruscia.'

"We confess to some regret at not being able to find some way to escape from following the rule laid down in *Henderson v. De Turk*, 164 Cal. 296, [128 Pac. 747]. The record shows that the state and county tax on these lots was delinquent for several years prior to 1905, and they were sold to the state and were redeemed by Cooper after he purchased the land at tax sale in 1906. The owners seem to have paid no heed to their duty to the state and not until valuable and expensive improvements were in good faith put upon the lots did they assert any claim to them. The law, however, we conceive to be the same, under the facts appearing, as if no improvements had been made on the lots, and we are constrained to follow the law as our supreme court has established it.

"We have vainly tried to convince ourselves that the name of the owner cannot be deemed an essential in the assessment on the theory that section 3628 of the Political Code and section 50 of the Irrigation Act expressly provide that no misnomer of the owner 'affects the sale,' and on the theory that if the name is not known to the assessor the assessment may be made to 'unknown owners.' It might be said that the owner of the land is presumed to know its description, and that the recorded duplicate certificate is notice to him if it correctly describes the land, whether or not his name appears as the owner, and hence, 'the name of the person assessed' might be dispensed with by the legislature as a nonessential. We cannot accept such reasoning as sound, for we are always brought back to the proposition that the essential requirement of 'listing' land for assessment necessarily involves the

coupling of the owner's name, if known, with the description of the land, and if not known, a statement of that fact."

The judgment is reversed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 3, 1916, and the following opinion then rendered thereon:

SHAW, J.—The petition for a rehearing of this cause in the supreme court is denied.

Nothing in the opinion should be deemed to hold that the correct name of the owner is so essential to a tax assessment or a certificate of tax sale that an error therein as to the name of the owner cannot be cured by the section making the deed conclusive evidence of the regularity of the assessment and certificate. The decision can be supported on the ground that the conclusive evidence clause does not extend to defects in the deed itself, as was held in *Henderson v. De Turk*, 164 Cal. 296, [128 Pac. 747].

Melvin, J., Lorigan, J., Sloss, J., and Lawlor, J., concurred.

---

[Civ. No. 1456. Second Appellate District.—June 10, 1916.]

JOHN TISCHHAUSER, Respondent, v. A. S. PRENTICE et al., Defendants; W. J. BRYANT et al., Appellants.

PROMISSORY NOTE—CONSIDERATION—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—In an action on a promissory note, where two of the comakers of the note contend that it was given in consideration of the payee desisting from further prosecution of the third maker on a criminal charge, but the evidence is conflicting upon this issue, the findings of the trial court in favor of the plaintiff are conclusive on appeal.

Id.—DELIVERY OF NOTE IN VIOLATION OF CONDITION—IGNORANCE OF PAYEE OF CONDITION—VALIDITY OF NOTE.—In an action upon a promissory note executed by three parties, where two of the makers

contend that they signed and delivered the note to the third upon the condition that he should obtain the signatures of two other parties before delivering it to the payee, which condition was not fulfilled, the breach of the condition is not a defense to an action upon the note, where the payee was not advised of the condition at the time of its acceptance; and the same is true of a defense that the signatures of these parties were obtained by fraud practiced upon them by the third party, the payee having no knowledge of these facts.

**12.—CONSIDERATION—EXTENSION OF TIME FOR PAYMENT OF DEBT.**—The extension of time for payment of a debt presently due is a valuable and sufficient consideration for a promissory note given for the amount of the debt.

**APPEAL** from an order of the Superior Court of Los Angeles County refusing a new trial. John M. York, Judge.

The facts are stated in the opinion of the court.

Johnstone Jones, Jacob A. Visal, and V. J. Cobb, for Appellants.

Len Claiborne, and Ben Goodrich, for Respondent.

**CONREY, P. J.**—The defendants W. J. Bryant and Lorenzo D. Swartwout appeal from an order denying their motion for a new trial. The judgment is founded upon a note for \$623, payable to the plaintiff and signed by the defendants Prentice, Bryant, and Swartwout. As stated by counsel for appellants, their chief contentions are that they signed the note and delivered the same to their co-obligor Prentice on a condition which was not performed; that the consideration for the note was illegal; and that their signatures were obtained by fraud exercised by defendant Prentice in procuring such signatures.

At the trial appellants amended their answer and thereby alleged that at the time of accepting the note the plaintiff had full knowledge of the circumstances attending their execution of the note, and knew that the defendants signed said note merely as sureties thereon, and agreed to deal with them in the capacity of sureties and not as principals. But it was admitted at the trial that the note was delivered to plaintiff without knowledge on his part that its delivery was contrary

to any instructions given by appellants to Prentice, and their counsel state in their final brief that the law of suretyship and the fact that appellants were sureties "are almost foreign to this case."

The facts are that prior to the execution of this note the defendant Prentice was in debt to plaintiff in the sum of \$623, which is the principal sum named in the note. The plaintiff was pressing for payment and at the same time a criminal action against Prentice was pending in the police court of the city of Los Angeles under complaint charging Prentice with having obtained money by false pretenses, and the plaintiff John Tischhauser was the complaining witness in that action. Appellants by their answer in this action alleged that the note in suit was delivered to plaintiff and accepted by him in consideration of his desisting from further prosecution of Prentice on said criminal charge. There is some evidence in the record tending to support this defense, but there is also substantial evidence to the contrary, and the charge was flatly denied by the plaintiff. Therefore, the court's finding of fact is conclusive, and appellants in further urging illegality of consideration as a ground for sustaining their appeal are contending in vain against established facts.

The second defense contained in the answer of appellants was that they signed the note and gave the same to Prentice upon condition that he should obtain the signatures of Alec and Annie Odett to the note before delivering it to the plaintiff, and should not deliver the note unless those signatures were obtained, but that in fact the note was delivered in violation of the said condition. Appellants' theory is that the contract sued upon is incomplete and not the obligation which they intended to make; that they as sureties intended to bind themselves jointly with two other sureties, the Odetts, but not otherwise, and that without those names it is not their note. The evidence shows that Prentice falsely stated to Bryant that the Odetts had promised to sign the note with him, and shows that Bryant signed with the understanding that the note was not to be used without those signatures; and it also appears that Swartwout in signing the note relied upon the fact that Bryant was his cosurety. The difficulty with this defense is that these facts were not made known to Tischhauser before he accepted the note. Prentice (called

as a witness for the defendants) testified that he did not tell Mr. Tischhauser anything about the circumstances under which he had obtained the note from Bryant. In support of their contention that the surety was not liable because the delivery was on a condition which was not performed, appellants refer to *Ayres v. Milroy*, 53 Mo. 516, [14 Am. Rep. 465], and several other cases. *Ayres v. Milroy* contains language which apparently supports this contention, but we find that decision later discussed in *State v. Potter*, 63 Mo. 212, [21 Am. Rep. 440], and justified solely on the ground that Ayres was apprised of the condition on which the surety was to be bound. The decision in *State v. Potter* then proceeds with a discussion of numerous decisions, including a majority of those cited in appellants' brief herein, and shows that in a majority, if not all, of them there were circumstances sufficient to put the obligee upon notice of the incompleteness of the bond or note. The court then holds that where the surety who defends the action had invested the principal with an apparent authority to deliver the bond and there was nothing on the face of the bond or in any of the attending circumstances to apprise the obligee, who accepted it, that there was any secret agreement which should preclude the acceptance of the bond, the surety alone is at fault, and his liability will be enforced. The court declares that such a case furnishes an opportune application of the language of Lord Holt in *Hern v. Nichols*, 1 Salk. 289, [91 Eng. Reprint, 256], that "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

The claim by appellants that their signatures were obtained by fraud practiced upon them by Prentice is subject to the same infirmity as their claim that the note was delivered upon a condition which was not performed. Knowledge of the facts was not brought home to the plaintiff. The note was received and accepted according to its form as a note executed by the defendants, and was delivered by one of the makers under apparently complete authority from all. By accepting the note plaintiff granted an extension of time for payment of a debt presently due, and that was a valuable and sufficient consideration.

As there are no errors in the rulings of the court or in the conduct of the trial which substantially affect the merits of this case, a new trial was properly refused.

The order is affirmed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 10, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 7, 1916.

---

[Crim. No. 627. First Appellate District.—June 12, 1916.]

THE PEOPLE, Respondent, v. RALPH C. HOVIS, Appellant.

CRIMINAL LAW—GRAND LARCENY—SUFFICIENCY OF EVIDENCE—CORROBORATION OF ACCOMPLICE.—It is held in this prosecution for grand larceny that the testimony of an accomplice of the defendant was sufficiently corroborated to satisfy the statute.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Curtis G. Ledgerton, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—This is an appeal from a judgment of conviction of the crime of grand larceny, and from an order denying the defendant a new trial.

The only point urged upon the hearing of this appeal is as to whether or not the testimony of the accomplice of the defendant in the theft of the property—an automobile—has been sufficiently corroborated by other evidence to satisfy



the requirements of the statute. We have carefully examined the record, and are satisfied that there is ample evidence which of itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the crime.

The testimony of the accomplice Daley was to the effect that in conversation with the defendant Hovis shortly before the commission of the crime, with reference to the taking and disposal of an automobile, the defendant had told him that if he, Daley, would get the machine the defendant, Hovis, would tell him where to take it and show him where he could sell the machine, and that they would share the proceeds. He also testified circumstantially to the efforts of himself and the defendant to dispose of the machine after it had been stolen. Other and independent witnesses testified that Hovis and Daley were seen together with the machine on the day of its theft; that they took it to a garage together and left it there for two or three weeks; that the defendant applied to a man named Allyn, who lived in San Jose, to help him find a purchaser for such a machine for a young friend of his who wanted to make a quick sale. Mr. Allyn referred him to a Mr. Seifert in San Jose who might become a purchaser, whereupon the defendant and Daley took the machine to San Jose, where they went under assumed names, and where they attempted to have Seifert purchase the machine, and from whom they received \$25 on account of a sale; that not long after the theft of the machine he went to the office of a lawyer in San Francisco, and there caused to be made out the form of a bill of sale of an automobile, leaving blank the place for its description, which was afterward filled in with the description of the stolen machine.

We think these facts amply sufficient to furnish the needed corroboration of the testimony of the accomplice under the rule as laid down in the case of *People v. Leavens*, 12 Cal. App. 178, [106 Pac. 1103].

The judgment and order are affirmed.

[Civ. No. 1506. Third Appellate District.—June 13, 1916.]

**GEORGE W. TUBBS, Appellant, v. STONE & WEBSTER  
CONSTRUCTION COMPANY (a Corporation) et al.,  
Respondents.**

**NEGLIGENCE—WHEELING OF WHEELBARROW ON ELEVATED AND NARROW  
RUNWAY—DEPARTURE FROM CUSTOMARY METHOD—DIRECTION OF  
EMPLOYER.**—A corporation engaged in the construction of a concrete wall as part of a power-house is guilty of negligence in directing a laborer employed by it to wheel a wheelbarrow along a plank runway forty feet above the ground and about four feet wide, and unprotected by any railing, and to return with his wheelbarrow which was thirty inches wide, in the direction from which he had brought his barrow filled with cement and from which other laborers were approaching, instead of going around to the point of loading as was customarily done.

**ID.—ASSUMPTION OF RISK—QUESTION FOR JURY.**—Under such circumstances the risk the plaintiff incurred in turning back and in trying to pass approaching wheelbarrows was not one of the ordinary risks of the employment, but was a risk caused by the negligence of the master, and before it can be said, as a matter of law, that plaintiff assumed such risk, it must be shown that when he went ahead he knew and appreciated the danger.

**ID.—FALL FROM RUNWAY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**—In an action to recover damages for injuries sustained by such a laborer in falling from the runway while placing his wheelbarrow in an upright position to allow approaching wheelbarrows to pass him, it is for the jury to say whether the plaintiff was guilty of negligence under such circumstances in moving too near to the outer side of the runway.

**ID.—EMPLOYERS' LIABILITY ACT—EFFECT UPON CASE.**—Considering such action with reference to the provisions of the Employers' Liability Act of 1911 (Stats. 1911, p. 796), assumption of risk is no defense, and contributory negligence is a conditional defense dependent upon the comparative negligence of the parties.

**APPEAL** from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

Harris & Hayhurst, and George Cosgrave, for Appellant.

Barnard & Watters, and James Alva Watt, for Respondents.

ELLISON, J., *pro tem.*—Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him while in the employ of the corporation defendant. At the close of the testimony introduced on behalf of the plaintiff the defendants moved the court for a judgment of nonsuit, which motion was granted. From the judgment that followed this appeal is prosecuted.

The record shows that, in September, 1913, the defendant corporation was engaged in the construction of a concrete wall as part of a power-house in Fresno County, and had in its employ, engaged in said work, a number of men, including the plaintiff. At the time of the accident to the plaintiff the wall had been built up to a height of about forty feet. Below it on the ground level there was a cement floor. Around the inside of the wall was a plank runway four feet wide supported by scaffolding. The runway had no railing or anything else on its side as a protection to those working upon it. It was of rectangular shape. The work of filling the molds with cement in constructing the wall was being done as follows: At one corner of the runway was a hopper into which the cement was placed by means of a hoist that brought it up from the ground. On the runway some eighteen men were working, each with a wheelbarrow. The wheelbarrows were thirty inches wide and weighed seventy-five pounds when empty and two hundred and fifty pounds when loaded with cement. Each man would place his wheelbarrow under the spout of the hopper and it would be filled by pulling a lever and letting the cement run into it. Then it would be moved to the place on the wall where needed and be emptied into the molds or forms, after which it would be pushed in the same direction it had been moving and around the runway until it again came to the hopper. In this work the men with their wheelbarrows formed a continuous procession. The plaintiff was employed to wheel one of these wheelbarrows, and had been at work about one hour and a half when the accident occurred.

The plaintiff testified: "Well, I was wheeling concrete, you know; when we would empty our wheelbarrow we would go around back to the chute and fill up again, and Brown when I brought a wheelbarrow around, he said, 'Turn around and go back, you are losing too much time going on around.' Q. Where was Brown at that time? A. He was right about here.

[Indicating.] Right about opposite to me when he spoke to me. Q. The point you are speaking of is where you were dumping the concrete, I believe? A. Yes, sir. Q. What else did he say to you? A. I don't know exactly what he said; he said, 'Turn around and go back, you are losing too damn much time going around this way.' Q. What did you do then? A. I just sat down my wheelbarrow and started back with it. Q. Had you already emptied your wheelbarrow at that time? A. Yes, sir; I had just emptied my wheelbarrow when he told me to go around, turn around and go back. When I started back I saw another wheelbarrow coming from the dumper here, and so I knew I couldn't pass him, you know; so I pulled my wheelbarrow around and straightened up to allow him room to pass, and I don't know what happened after that; I was struck, and I went down, and I don't know just exactly— Q. How far down did you go? A. I should judge about thirty-five or forty feet. Q. Did you strike on the way down? A. I must have. I was cut up underneath the jaw, and the whole side of my face was cut up, and this leg was broken. Q. Which leg broken? A. Left one, halfway to the knee. Q. Mr. Tubbs, at the time that you turned back, do you know whether the runway there was wide enough so that another wheelbarrow could pass you? A. I thought it was wide enough by the other man being careful, because there was room enough if he had been careful. Q. Had you been wheeling before that time, using a wheelbarrow on this runway? A. Not on that runway; no, sir." On cross-examination he testified: "Q. Was there any man following you with a load? A. Well, yes, there was another man following me; but I didn't know he was following me. Q. You didn't know he was following you? A. No, until I turned around and Brown told me to start back and I took my wheelbarrow like this [indicating] and started back, and as I started back I saw this other fellow coming; and I thought after I pulled my wheelbarrow up like that [indicating] there would be room for him to pass, and there would have been room if he had been careful. I don't know exactly but I was about fifteen feet from the loading point. Q. In starting back how many steps had you taken before you fell? A. I took two or three steps, I believe, as near as I can say. Q. How near did you approach the man coming in the opposite direction? A. I don't know

exactly how near I was to him. I see him coming and I pulled up that way just to allow him room to pass. There would have been room enough if he had been careful. Q. You said this morning in answer to your counsel that you knew you couldn't pass him, did you not? A. I was going along with the wheelbarrow that way [indicating]. I knew I could not have done it that way [indicating]. I pulled up the wheelbarrow to allow him to pass. Q. You knew you couldn't pass him on that narrow walk, did you? A. Yes, sir. Q. The two wheelbarrows were wider than the walk, were they not? A. Yes, sir. Q. You saw it was dangerous, didn't you? A. Yes, sir. Q. And you knew that it was dangerous, did you not? A. Well, it wouldn't have been dangerous if he had been careful. Q. How close would you have to stand to the edge in order to allow him to pass with a loaded wheelbarrow? A. I would have to stand right on the edge. Q. And you say that there was a sheer fall there of forty feet or thereabouts? A. Yes, sir. Q. But you knew it was there? A. Yes, sir. Q. How near did you approach him before you fell? A. Oh, about—I don't know; about eight or nine feet, maybe ten. I don't know how far I saw him coming and I knew I could not pass him. Q. He was still eight or nine feet from you when you fell? A. Yes, sir."

The defendants' motion for a nonsuit was made upon the grounds: 1. That the evidence failed to prove the negligence alleged in the complaint; 2. That the evidence shows without conflict that the accident occurred by reason of the plaintiff's negligence in "voluntarily, carelessly, and negligently and unnecessarily approaching too near to the outer side of the runway; 3. That the danger of drawing to one side of the runway and attempting to permit another person to pass with a loaded wheelbarrow in the position he was, and the danger of his attempting to return toward the point of loading in the same direction in which he had come was so obvious and so apparent that to do so was to assume the risk of the accident occurring necessarily involved; that the danger of falling by attempting to draw near to the side of the runway with his wheelbarrow to permit another to pass with a loaded wheelbarrow was obviously so dangerous that any person in possession of his faculties could not be justified in doing so, even at the command of his employer. "We rely

in this motion upon the testimony of the plaintiff himself and upon the law as declared by the supreme court in the case of *Hall v. Clark*, 163 Cal. 392, [125 Pac. 1047].''

Upon the first ground of the motion little need be said. That the defendant corporation owed a duty to the plaintiff, not to order him to return with his wheelbarrow in the direction from which others with loaded wheelbarrows were approaching upon a narrow runway forty feet high, unprotected by a railing, is too obvious to need discussion. We do not understand that the defendant seriously contends that defendant was not guilty of negligence in giving to the plaintiff the order it did.

The statements, contained in the motion, of conduct of the plaintiff claimed to justify a nonsuit were twofold: 1. That he was guilty of contributory negligence causing the accident; and, 2. That he assumed the risks involved in trying to obey the orders he had received. These two defenses, while often considered together without much attempt to distinguish them, involve different rules and principles, and, while both may and often do coexist in the same case, yet they are not the same. A person may undertake to do a very dangerous thing and yet do it in a very careful manner. The difference between the two defenses is very clearly stated in the case of *Choctaw etc. R. R. Co. v. Jones*, 77 Ark. 367, [7 Ann. Cas. 430, 4 L. R. A. (N. S.) 837, 92 S. W. 244], from which we make the following excerpts: "The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable even though the defendant has been guilty of negligence. It applies when the defendant is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger, and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he

was guilty of carelessness or not. In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and, if he negligently fails to do so, he will still be held to have assumed them. But the servant is not presumed to know of risks and dangers caused by negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it. But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

Considering the alleged contributory negligence of the plaintiff as distinguished from assumption of risk: He had been ordered to turn back with his wheelbarrow on the plank runway and obeyed. After he had turned and started back he noticed another wheelbarrow coming toward him and discovered for the first time that the two could not pass if both were rolled along in the ordinary manner. He was thus confronted with a new and unexpected situation and danger.

Thinking quickly and without much time for deliberation, he decided that by stepping toward the edge of the runway and placing his wheelbarrow in an upright position, the other could pass him with safety. He accordingly adopted this course of action and, either by being struck by the wheelbarrow or by losing his balance (the record is not clear as to which), he fell and was injured. Whether under the circumstances it was negligence for him to move to the edge to let the other wheelbarrow pass and whether in doing so he acted carelessly were questions that the jury should have been permitted to pass upon. The evidence and all the attending circumstances, with all the inferences that might be drawn therefrom, did not present such a case as to make his negligence a pure question of law. He was only required to do what was reasonable under existing circumstances. The case was undoubtedly one where the reasonableness of the effort to escape injury after the discovery of the danger was a question for the jury to be determined by them in view of all the circumstances shown by the evidence.

"If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault, and of such case it is said: 'Even if, in bewilderment, he runs directly into the danger which he fears, he is not at fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person.'"  
(*Antonian v. Southern Pac. Co.*, 9 Cal. App. 728, [100 Pac. 882].)

As to assumption of risk: The risk he incurred in turning back and trying to pass another wheelbarrow was not one of the ordinary risks of his employment, but, in the language of the decision quoted from, it was a "risk caused by the negligence of the master after he entered the service and which changed the condition of the service," and, as said in the same case, "as the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly

shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

We think the plaintiff's evidence does not make it clearly appear that when he entered upon the performance of the new order, given him by the foreman, he knew and appreciated the danger involved in obedience. His testimony is fairly susceptible of the construction that not until he had started back with his wheelbarrow and not until he saw the other wheelbarrow approaching him did he know or realize that the two wheelbarrows could not be wheeled by each other with safety. Up to this point, then, he had not assumed the risk incident to changed conditions of his work. Not knowing at that time that the two wheelbarrows could not pass, he did not "know and appreciate the danger of obeying the order he had received."

"The servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed." (Shearman & Redfield on Negligence, 6th ed., sec. 207h.) "When ordered into a place of danger the servant will not be chargeable with having assumed the risk, unless so glaring that no prudent man would have encountered it, if he acts with reasonable prudence in its execution." (Shearman & Redfield on Negligence, 6th ed., sec. 207h, notes.) "But the present case comes under the limitations to that doctrine to the effect that 'if the danger is not so absolute, or imminent, that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not be allowed to defend, on the ground that the servant ought not to have obeyed the order.'" (*Choctaw etc. R. R. Co. v. Jones*, 4 L. R. A. (N. S.) 858, note.)

The conclusions we have reached on this branch of the case are not at all in conflict with the decision in *Hall v. Clark*, 163 Cal. 392, [125 Pac. 1047], but are in harmony with it. The two cases are readily differentiated. In that case the plaintiff could know and appreciate the dangers incident to obeying the order as soon as it was made. The situation was visible, apparent, and known. In this case the danger was not known or appreciated until the risk had been well

entered upon. In that case the plaintiff, with full knowledge of all the facts, did a manifestly dangerous act. In this case the plaintiff, after being placed in a dangerous position, before he knew it was dangerous, moved to one side to let the other man pass, believing it was a safe thing to do if the other man was careful, as he testifies, and we are not prepared to say that a jury would or ought to have found that the act was one no ordinarily prudent man would have attempted under the circumstances.

Thus far the case has been considered without reference to the provisions of the act of 1911 (Stats. 1911, p. 796), known as the Employers' Liability Act. That act deals with both contributory negligence and assumption of risk as defenses to actions of this kind but gives a different effect to each. Contributory negligence by that act is made a conditional defense. Assumption of the risk of the hazard is denied all efficacy as a defense. Under that act contributory negligence does not bar a recovery where it is slight and that of the employer is gross in comparison, but the damages may be diminished by reason of such contributory negligence.

So in this case, if the jury had found that the plaintiff was negligent in trying to pass the wheelbarrow in the manner he did, they could not then have given a verdict in favor of the defendant for that reason, unless they also found that his negligence was more than slight as compared to the negligence of the defendant. A case might arise when great negligence on the part of a plaintiff would be considered slight when compared with the negligence of the defendant. So, even if, in this case, the plaintiff was guilty of negligence contributory to the injury, still it was for the jury to compare it with the negligence of the defendant, and, if found to be slight in comparison, give a verdict for him with a reduction of amount on account thereof, but not give a verdict for the defendant unless the plaintiff's negligence was found to be more than slight in comparison with the defendant's negligence.

The plaintiff testified that to permit the other man to pass him would not be dangerous if the other was careful. If the jury believed this statement, they would have been justified under the circumstances in finding that the plaintiff was not guilty of negligence, or, if he was, that it was only slight as compared with defendant's.

The Employers' Liability Act provides: "It shall not be a defense (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of." This would seem to dispose of the claim that plaintiff cannot recover because he assumed the risk of the hazard. It is to be noted that this act was not in force when the cause of action arose in *Hall v. Clark*, 163 Cal. 392, [125 Pac. 1047], and in the decision that feature is incidentally referred to. (See p. 395.) The act does not use the expression "risk of the employment," but "risk of the hazard complained of," and this is broad enough to include both the ordinary and extraordinary risks of an employment.

"But even if it be said that the station as used by Crabbe was in an unsafe condition and that he knew it, this amounts to no more than a declaration that Crabbe assumed the risk of a known hazard. But this fact, by the very terms of the Employers' Liability Act, no longer affords the employer a defense." (*Crabbe v. Mammoth etc. Co.*, 168 Cal. 500, [143 Pac. 714].)

Our conclusion is that the jury should have been permitted to pass upon the case.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 10, 1916.

---

[Civ. No. 1536. Third Appellate District.—June 12, 1916.]

J. WILLIAM ROBERTS, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF STANISLAUS, Respondent.

JUSTICE'S COURT—VENUE—SERVICE OF SUMMONS OUTSIDE COUNTY—JURISDICTION.—In an action to recover for services, where it appears by the complaint and is nowhere denied that the obligation sued on was incurred in the township and county where the action was brought, that the defendants, at the time the obligation was incurred, resided in said township and county, and (by necessary inference), if they resided in another county at the time the action was brought, departed from said township and county after the

obligation was incurred, that there was no special or other agreement in writing that the obligation was to be performed in any other place than in the township and county where it was incurred, under section 832 of the Code of Civil Procedure the court acquired jurisdiction of the action, and under section 848 of the same code service of summons outside the county in which the action was brought was properly made.

**ID.—MOTION TO DISMISS COMPLAINT—EFFECT OF.**—A motion to dismiss a complaint on the ground that the court is without jurisdiction of the subject matter of the action is substantially, or in legal effect, a demurrer to the complaint on that ground, or necessarily calls for relief which may be demanded only by a party to the record.

**ID.—GENERAL APPEARANCE—WHAT CONSTITUTES.**—In such a case, where the defendants appeared in the action and made a motion not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction "over the persons of the defendants *and the subject matter of the litigation*," their appearance was a general appearance, and they thereby submitted themselves to the jurisdiction of the court.

**ID.—APPEARANCE—NATURE OF—RELIEF SOUGHT CONTROLS.**—Where a party appears and asks for such relief, although expressly characterizing his appearance as special, and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material.

**ID.—LACK OF JURISDICTION OF PERSON—PLEA IN ABATEMENT.**—Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement and find no special favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. Such a plea is purely a dilatory one, and when a defendant seeks to avail himself of it, he must stand upon his naked legal right and seek nothing further from the court than the enforcement of that right, and if he asks further relief, he waives the irregularity of his summons.

APPLICATION originally made to the District Court of Appeal for the Third Appellate District for a Writ of Review to annul a judgment of the Superior Court of Stanislaus County.

The facts are stated in the opinion of the court.

Walter E. Burke, for Petitioner.

Francis O. Hoover, and Cross & Hoover, for Respondent.

HART, J.—This is a petition for a writ of review.

The facts as shown by the petition are: On the nineteenth day of August, 1915, one S. N. McBride instituted an action in the justice's court of Modesto township, county of Stanislaus, jointly against the petitioner herein and his wife, Louise C. Roberts, for the recovery of the sum of \$222.29, alleged to be due the plaintiff from the defendants in said action for services alleged to have been performed by the plaintiff "at the special instance and request of defendants and each of them in checking, leveling, cultivating, farming, and irrigating a tract of land belonging to the said defendants and located in the said township, county, and state." The complaint was in three different counts, each setting out the same cause of action in different forms and in each of which it was alleged: "That at the time defendants employed plaintiff to do said work and labor, and at the time said obligation was incurred, the said defendants and each of them resided in the said township, county, and state."

The petition here alleges that, upon the filing of the complaint in said action, "process issued, and petitioner who was one of the defendants in said complaint named, was served in the county of Los Angeles, state of California, on or about the twenty-sixth day of August, 1915."

It is further likewise alleged that "the defendants are not, and never were, residents of the township of Modesto, county of Stanislaus"; that thereafter, to wit, on the third day of September, 1915, counsel for the defendants in said action made what is termed in his written motion as a special appearance for said defendants "only for the purpose of objecting to the jurisdiction of the court over the persons of the defendants and the subject matter of the litigation herein," and moved for a *dismissal of the complaint* "on the ground that prior to and at the time of the issuance of the summons herein, the defendants were and still are residents of Los Angeles, in the state of California, and that any contract to perform any obligation to the plaintiff herein was to be performed in the said county of Los Angeles, and that there is no special contract in writing to the contrary."

The said motion was supported by the affidavit of each of the defendants, deposing that they and each of them were residents of Los Angeles at and prior to the commencement of said action and the issuance of summons therein, and are still residents of said place, and "that any contract to perform any obligation to the plaintiff herein was to be performed in the county of Los Angeles, and there is no special contract in writing to the contrary."

In opposition to said motion and the affidavits of the defendants, the plaintiff in said action filed an affidavit in which he declared, as his complaint in effect alleged, that "the obligation sued upon herein was incurred in Modesto township, county of Stanislaus, . . . that all work therein referred to was performed in said township, . . . and that there is not, and never was, a special or any contract to the effect that said contract or the obligation herein sued upon was to be performed in any other place than the said Modesto township, . . . or that the money herein sued for should be paid in any other place."

On the fifteenth day of October, 1915, having overruled the motion to dismiss the action, and the defendants failing to answer the complaint, the justice's court rendered and entered judgment by default in favor of the plaintiff and against the defendants for the sum sued for, with interest and costs.

Thereafter, and within due time, the defendants took an appeal to the superior court of Stanislaus County from the judgment so entered. The appeal was upon questions of law alone, and was supported by a statement of the case.

On the ninth day of February, 1916, having heard the appeal, the superior court rendered its judgment affirming the judgment of the justice's court, and directed the justice of the peace to proceed to issue execution upon said judgment or to take such other action in the premises as might be legal and proper.

It is the judgment so rendered by the superior court which it is the object of this proceeding to have annulled and set aside on the ground that said court, in rendering it, acted in excess of its jurisdiction; the specific point being, that (so it is contended) inasmuch as the defendants resided in Los Angeles County and did not contract in writing to perform the obligation sued on at the place where the action was

brought, the service of summons upon the defendants in Los Angeles County or outside the county wherein the action was instituted was void and of no effect; that, therefore, the justice's court never acquired jurisdiction of the persons of the defendants, and that, as a consequence, the judgment entered against them by said court was *coram non judice*; that, of necessity, since the judgment appealed from was void, the superior court did not, and could not, acquire jurisdiction to review the case and enter a judgment therein.

The place of trial of actions commenced in justices' courts is fixed by section 832 of the Code of Civil Procedure. Therein it is provided, *inter alia*: "Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: . . . 7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, *unless there is a special contract in writing to the contrary.*"

Section 848 of said code contains, among other provisions, the following: "The summons cannot be served out of the county wherein the action is brought, except in the following cases: . . . 4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred, and thereafter departed therefrom, in which event he may be served wherever he may be found."

Reading the foregoing sections together, in the light of the facts as they are presented by the record certified to this court, there is but one permissible conclusion to be arrived at here, viz., that the action was properly brought in the justice's court of Modesto township, in Stanislaus County, and that the summons was properly served on the defendants in Los Angeles County.

These facts are expressly and plainly made to appear by the complaint in the action and were nowhere or in no manner denied: That the obligation sued on was incurred in Modesto township, Stanislaus County; that the defendants, at the time the obligation was incurred, resided in said township and county, and (by necessary inference) if they resided in Los Angeles County at the time the action was brought, de-

parted from said township and county after the obligation was incurred; that there is or was no special or other agreement in writing that the obligation was to be performed in any other place than in Modesto township, in Stanislaus County, wherein it was incurred.

It follows from those facts and the code sections above mentioned that the justice's court not only had jurisdiction of the action, but, as above suggested, that the summons was properly and legally served upon the defendants in Los Angeles County. If this be not true under the facts as stated and as they appear here, then the provisions of the code to which we have referred are meaningless.

We do not believe that the court, in *Olcese v. Justice's Court*, 156 Cal. 82, [103 Pac. 317], intended to say anything which may be construed as in conflict with the conclusion arrived at here with respect to the meaning of the sections of the code above referred to. In that case, the action was brought in one of the judicial townships of Contra Costa County, and service of summons upon the defendant had in the city and county of San Francisco. The plaintiff, in the service of summons, proceeded upon the theory of subdivision 2 of section 848, *supra*, and undertook to defend the service upon the terms of said subdivision, which provides that "when the action is against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county," summons may be served in the county wherein he is found. The complaint in that case, however, did not allege that the contract upon which the action was brought was in writing, and the court held that, while jurisdiction of the subject matter of the action was in the justice's court (Code Civ. Proc., sec. 832, subd. 7), "yet, by the provisions of section 848 of the Code of Civil Procedure, as amended in 1907, service upon the defendant may not be had outside of the county in which the action is brought, unless the contract be in writing." The opinion in that case, so far as the question of the service of summons is concerned, merely deals with subdivision 2 of section 848, and does not declare, and we are sure did not intend to say, that if the defendant was a resident of the county wherein the action was brought at the time the obligation sued on was incurred and thereafter departed therefrom, service upon him could

not be had unless the contract from which such obligation arose was in writing.

There is, however, another answer to the petition for the relief sought herein, in that the defendants made a general appearance and so submitted themselves to the jurisdiction of the court. Their motion, as will be noted, was not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction "over the persons of the defendants and the subject matter of the litigation."

The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process. (*In re Clark*, 125 Cal. 388, [58 Pac. 22]; *Security Loan & Trust Co. etc. v. Boston & South R. F. Co.*, 126 Cal. 418, [58 Pac. 941, 59 Pac. 296]; *MacClay Co. v. Meads*, 14 Cal. App. 363, [112 Pac. 195, 113 Pac. 364]; *Olcese v. Justice's Court*, 156 Cal. 82, [103 Pac. 317].)

"It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material." (2 Ency. Pl. & Pr. 625, notes and cases; *In re Clark*, 125 Cal. 388, 392, [58 Pac. 22].)

In *Security Loan & Trust Co. v. Boston & South R. F. Co.*, 126 Cal. 418, [58 Pac. 941, 59 Pac. 296], above cited, it is said: "If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. If he raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though

termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

In the Olcese case, the court, by Mr. Justice Henshaw, says: "Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement and find no special favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea, and when a defendant seeks to avail himself of it he must, for very obvious reasons, stand upon his naked legal right and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court."

For the reasons herein stated, the writ is discharged.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

---

[Crim. No. 463. Second Appellate District.—June 14, 1916.]

THE PEOPLE, Respondent, v. MASON BRADFIELD,  
Appellant.

**CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—PRIOR THREATS—**

**INSTRUCTION.**—In a prosecution for the crime of assault with a deadly weapon with the intent to murder, the following instruction is not made erroneous by the modification embodied in the phrase and word shown in parentheses, to wit: "One who has received information of threats against his life or person made by another, is justified in acting more quickly and taking harsher measures for his own protection in event of assault, either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence (that the prosecuting witness made threats against the defendant and) that the defendant, because of (such) threats made previously to the transaction complained of by the prosecuting witness and communicated to the defendant either by the prosecuting witness or some other person,

had reasonable cause to fear greater peril in event of an altercation with the prosecuting witness than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety."

**ID.—EVIDENCE OF PREVIOUS DIFFICULTIES—CONSIDERATION BY JURY—PROPER INSTRUCTION.**—An instruction that the jury might consider the evidence of previous difficulties between the parties for the purpose of determining their state of mind at the time of the assault, as well as for the purpose of showing malice, is not erroneous.

**ID.—JUSTIFICATION OF ATTACK—PROPER INSTRUCTION.**—An instruction that "to justify a person for attempting to kill another man upon the ground of self-defense, the attempt must be made under well-founded belief that it was absolutely necessary for such person to kill the other at the time to save himself from great bodily harm. The danger or harm must be present, apparent and imminent," properly states that the person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law.

**APPEAL** from a judgment of the Superior Court of Ventura County, and from an order denying a new trial. Merle J. Rogers, Judge.

The facts are stated in the opinion of the court.

Earl Rogers, Veitch & Richardson, E. E. Moss, O. G. Kulin-ski, and Milton M. Cohn, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

**JAMES, J.**—The defendant was charged by the information of the district attorney with having, on the first day of July, 1915, committed an assault with a deadly weapon with the intent to murder George J. Henley. The jury by its verdict convicted the defendant of the crime of assault with a deadly weapon only. This appeal is taken from the judgment of the court which followed, and from an order denying the defendant's motion for a new trial.

The alleged assault occurred in the daytime on a street in the town of Fillmore, Ventura County. The complainant Henley occupied a tract of land in a canyon near Fillmore, across which and leading to more remote sections of the mountains was a road. This road was located on the ground

which Henley claimed to own, and he objected to persons traveling over it without first paying for the privilege. A corporation of which defendant was manager or superintendent was operating either for water or oil at a point above the Henley place. In order to reach the land of the corporation it was necessary, or at least desirable, to travel over the Henley road. Henley objecting, a suit was brought and finally a stipulation was made by which the right to travel upon this road was conceded to the corporation. Henley either raised some question about this right so conferred, later, or at least insisted that the privilege granted be strictly construed as not allowing the corporation or its agents upon any portion of the ground claimed by him outside of the roadway. While Henley and the appellant had been friends in former years, this dispute over the right to use the road engendered some bad feeling. According to the claim of appellant, which is given color by the evidence, Henley attributed to Bradfield all of the difficulty which he had had with the corporation which was under the management of Bradfield. At a time about three years prior to the occasion of the assault, Henley met Bradfield as the latter was traveling down the canyon on the road, and his attitude at that time was abusive and threatening. However, he made no attack upon Bradfield and showed no weapons. On this occasion, Bradfield testified, while he was engaged with his parley with Henley he glanced over by a building and there saw Mrs. Henley armed with a double-barreled shotgun, which was leveled in his direction. Bradfield testified that he walked about so as to keep Henley between him and the gun until a man named Snow drove down, when he (Bradfield) left the canyon, to which he had never returned. The corporation, however, through their agents and under the direction of Bradfield, had continued to prosecute some work on its property above the Henley place. As before mentioned, this wordy encounter took place three years prior to the date when the alleged assault was committed. On the first day of July, 1915, Henley came to the town of Fillmore to transact some business. He testified that he went to the office of the justice of the peace to look up the question of his rights regarding trespassers on his property, and later walked up the street; that in front of a real estate office, where Bradfield's company had its headquarters, he saw Bradfield; that Bradfield bowed and that Henley returned

the salutation; that Bradfield then came toward him; that he (Henley) stopped, thinking that Bradfield wanted to talk with him, and that he addressed Bradfield, asking him how he was getting along and where he was surveying at that time. Henley testified that he noticed some expression passing over the face of Bradfield and that he ran his eyes up and down the form of the latter; that he noticed a motion and as he raised his eyes he found that he was looking into a gun which Bradfield held aimed at him; that the next expression of Bradfield was, "Are you heeled?" that he (Henley) turned and said "No," and that as he turned he bowed his head, thinking that he was to receive a shot; that one shot was fired, striking him back of the shoulder, and then after a little intermission two more shots were fired, both of which took effect in his back; that he had started to go away as soon as he saw the gun in the hand of Bradfield, but that as he swung around and started, all of the shots had been fired. Henley testified that he was totally unarmed, except for a pocket-knife which was in his pocket, and none of the several witnesses who were almost immediately at the scene of the shooting saw any weapon, although Bradfield, the defendant, made the claim that Henley was carrying a gun. Henley, after being shot, staggered down the street some little distance and then fell to the ground from loss of blood. He was immediately picked up and attended by a physician. This physician testified that he found two wounds of entrance in the man's back; one bullet had entered at an oblique angle at about the center of the left shoulder-blade and proceeded across the man's back under the skin and lodged at some point over the right shoulder-blade. Another bullet had entered at the lower tip of the right shoulder-blade, had progressed to the right and around the man's body, and come out in front. A number of blood vessels were severed by the bullet which occasioned this last wound and profuse bleeding resulted. What appears to have been the first bullet fired did not enter the body of Henley, but passed through his clothing at the back from left to right. The appellant in giving his version of the shooting testified that on the day in question Henley passed his office several times and motioned for him (Bradfield) to come out; that being busy he paid no attention at first, but upon the second or third time that Henley passed he did go out and speak to him; that Henley asked him why he did

not come up into the canyon any more, and upon his replying that he had no occasion to, that he could have what he needed done by others, Henley had cursed him and told him he was afraid to go into the canyon; that Henley had made some motion which disclosed to the view of appellant the butt of a revolver in Henley's pocket; that appellant, knowing of Henley's proficiency both in the handling of a gun and knife, considered that he was about to be attacked, and drew his own weapon and fired. He testified that he fired three shots in rapid succession, aiming at the right shoulder-blade of Henley, with the idea of "crippling" him only. He did not contend that Henley had actually drawn a revolver, and at one point in his testimony said Henley reached for a gun, and at another point said that he was "looking for a knife from him." When asked as to whether he saw the revolver of Henley again that day, he said that he thought that he saw one of the witnesses who testified in the case take the gun from Henley after the latter had staggered away down the street. The witness referred to gave no testimony as to finding any gun upon or in the hands of Henley. Of course, it is enough to say that wherever there was a conflict of testimony the jury had the right to exclusively judge as to the fact. There was a great deal of testimony admitted touching the statements made by Henley to various persons respecting his rights in the canyon and his hostile feeling toward those who contended for the privilege of passing over his property. This testimony was introduced as tending to show ground for a reasonable fear in the mind of the appellant that at the time of the alleged assault he believed his life to be in danger, or that he was likely to suffer great bodily injury at the hands of Henley. Counsel for appellant at great length argues that the trial judge committed error prejudicial to the defendant when he struck out certain testimony of Bradfield, and in the giving of an instruction touching the question of prior threats when made by a person who is afterward injured at the hands of the one threatened. Bradfield testified that the man Snow, who had approached at the time of his wordy encounter with Henley in the canyon three years prior to the shooting, had talked to him about that occurrence. The record shows that the matter was presented in this way, Bradfield being on the witness-stand: "Q. Subsequently did Snow have a conversation in which he purported to tell you



the statements made by Mr. Henley respecting you and what should have or would have happened to you on that particular morning? A. Yes; in ten or fifteen days. Q. What did he tell you? A. He told me that Mrs. Henley had told him that George [Henley] had stopped me in the road and gave me a good roast, that I quit and got out of the canyon, and she did not think would ever come back again. Q. Did Mr. Snow tell you whether the Henleys said anything about the gun? A. Yes; she said she had her double-barreled shotgun filled up with pieces of lead pipe. She had whittled them off, and if I had made a move of any kind she would have torn me in two." Counsel say that they were entitled to have this testimony considered by the jury as indicating the character of Henley and the state of mind of appellant at the time of the shooting—as showing reasonable ground for the belief that the latter was about to be attacked when approached by Henley on the first day of July in Fillmore. It will be noted that not a word of this testimony referred to any threat made by Henley. Bradfield testified that he had on the occasion referred to observed the double-barreled shotgun leveled at him by Mrs. Henley, but he made no claim that Henley at that time exhibited any deadly weapon or threatened to use one. Counsel say it is "hard to realize a woman loading a shotgun with lead clippings," and likens the case to that of Kipling's grenadier who held a cocked rifle to the head of a wounded Afghan while the officer gave the injured man a drink of water, in order to prevent the latter man from shooting the officer as one had just done; and he says that Bradfield had the right to follow Mulvaney's example, and take extraordinary precaution against such cruelty as would recommend a woman to load a shotgun with lead clippings. Remembering that the encounter was between Bradfield and Henley, and not Mrs. Henley, the relevancy of testimony showing what Mrs. Henley did or might do is not apparent. We might quote a couplet by the same distinguished author to whom counsel has referred:

"When Nag, the cobra, hears the careless steps of man,  
He sometimes wriggles sideways to avoid him if he can;  
But his mate makes no such motion as she camps beside the trail,  
For the female of the species is more deadly than the male."

The fact that the trial judge struck out this testimony on the ground that it was hearsay, in that Snow was not pro-

duced, and it was in no wise made to appear that Mrs. Henley had actually made the statements communicated, does not present error of which appellant is entitled to complain, because the testimony, as we view it, was not relevant in the aspect which the case presents.

The court, at the request of defendant, gave the following instruction, with the modification embodied in the phrase and word which we have shown in parentheses: "One who has received information of threats against his life or person made by another, is justified in acting more quickly and taking harsher measures for his own protection in event of assault, either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence (that the prosecuting witness made threats against the defendant and) that the defendant, because of (such) threats made previously to the transaction complained of by the prosecuting witness and communicated to the defendant either by the prosecuting witness or some other person, had reasonable cause to fear greater peril in event of an altercation with the prosecuting witness than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety." The instruction as modified, when properly analyzed, means nothing more or less than it did in the form in which the appellant presented it to the court. In that form it stated quite clearly that threats such as would furnish ground in the appellant's mind for the belief that his life or person were in danger were those which had been "made previously . . . by the prosecuting witness." Appellant is not entitled to complain of error in an instruction which he himself has prepared and asked the court to present to the jury. An examination of other instructions offered by the defendant shows that in their phraseology it was assumed as a prerequisite that the threats which were communicated had actually been made by the prosecutor. Instruction 26, found in the clerk's transcript, contains language of that meaning. It may be conceded that it is not the law that it must appear that such threats were actually made by the prosecutor, and that it is sufficient that it has been stated to the person who acts thereon that such threats were made and that such statements were believed and

relied upon by the person charged with the assault. The trial judge allowed to be shown on behalf of the defendant very fully the attitude and disposition of Henley, as manifested by his words and acts touching the question of trespassers upon the property which he claimed to own. The objections which were sustained to questions tending to further emphasize the disposition of Henley in that regard, we think were in the main properly determined. The contentions urged in this direction are rather hypercritical, and the argument in support thereof attenuated.

It is complained very earnestly that the court erred in giving this instruction to the jury: "I instruct you that if you believe from the testimony in this cause that said defendant, Mason Bradfield, and the prosecuting witness, George J. Henley, prior to the first day of July, 1915, had certain difficulties and troubles, then, in that event, you are only to consider such testimony for the sole purpose of determining the state of mind of said defendant, Mason Bradfield, and said prosecuting witness, George J. Henley, at the time of the alleged assault, if any there was, and for the further purpose of showing malice, if any, the defendant had at such time." Counsel argue that the evidence of the previous difficulties between Henley and Bradfield was to be considered for the purpose of showing malice in the mind of Henley, the prosecutor. We make no distinction between the meaning of the expressions contained in the instruction where the court told the jury that such testimony was admissible for the purpose of determining the state of mind of the two men, and had the instruction advised the jury that such testimony should also be considered for the purpose of showing malice of Henley. By the instruction the jury was entitled to view the evidence as indicating whatever it might in the direction of explaining the whole state of mind of the two men. It was proper, too, to advise that evidence of the difficulties might be considered for the purpose of showing malice, if any, that the defendant had against the complainant, for under the charge as made, to wit, assault with intent to commit murder, malice was a material ingredient. The jury, however, did not find the defendant guilty of that crime, but convicted him of the lesser offense, which involved no specific malice on his part.

It is also declared that the following instruction misstates the law: "To justify a person for attempting to kill another

upon the ground of self-defense, the attempt must be made under well-founded belief that it was absolutely necessary for such person to kill the other at the time to save himself from great bodily harm. The danger or harm must be present, apparent, and imminent." Counsel's whole argument on this proposition is that in proving justification for an attack it need not appear that it was absolutely necessary for the person to resort to the means adopted and kill another. The instruction does not so declare. It does state, and properly, that the person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law. The jury was not told that it must find as a fact that the necessity did "absolutely" exist, but only that defendant so believed. The case of *People v. Webster*, 13 Cal. App. 348, [109 Pac. 637], is not contrary in its holding to this conclusion. Examining the whole body of the instructions, we find that the court sedulously and with great care defined to the jury the rights of a person charged with an assault who claims to have acted in self-defense. It was fully explained that the conduct of such person was only such as would be determined by the judgment of a reasonable man, and that he might act upon appearances, and that even though the danger was apparent, and not real, he would be justified.

The main contentions advanced by the appellant in his claim for a reversal have been carefully considered and the evidence, as disclosed by the lengthy transcript, thoroughly examined. We believe that the defendant in this case has been protected by the court in his right to a fair trial, and that the verdict of the jury is fully sustained by the evidence.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 10, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 7, 1916.



[Civ. No. 2094. Second Appellate District.—June 14, 1916.]

**JOSEPH WEIS**, Petitioner, v. **SUPERIOR COURT OF THE COUNTY OF SAN DIEGO** and **C. N. ANDREWS**, Judge of Said Court, Respondents.

**PUBLIC NUISANCE—INDECENT EXHIBITION OF WOMEN—INJUNCTION—JURISDICTION.**—The superior court has jurisdiction to restrain the proprietor of a public resort and place of amusement from conducting an indecent exhibition of the persons of the women therein employed, on the ground that such exhibition is a public nuisance, notwithstanding that such acts constitute the crime of indecent exposure as defined in section 311 of the Penal Code, for which, upon conviction, the law prescribes a penalty.

**ID.—ABATEMENT OF PUBLIC NUISANCE.**—Any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance, and under the provisions of section 731 of the Code of Civil Procedure, the district attorney is authorized to bring a civil action in the name of the people of the state to abate the same.

**ID.—CRIMINAL ACTS—INJUNCTION.**—While courts of equity have no jurisdiction to enjoin the commission of acts merely because such acts when committed would constitute a crime, yet, where the threatened acts, if committed, in addition to being an indictable offense, constitute a public nuisance, such courts are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof.

**APPLICATION** for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

Wm. E. Ginder, for Petitioner.

Spencer M. Marsh, District Attorney, and F. F. Schuermeyer, Assistant District Attorney, for Respondents.

**SHAW, J.**—Prohibition. Respondents have interposed a general demurrer to a petition, in compliance with which this court issued an alternative writ of prohibition directed to the superior court of San Diego County, commanding it to refrain

from further proceedings in a certain matter there pending, entitled "The People of the State of California, Plaintiff, v. Joseph Weis, Jane Doe and Mary Roe, Defendants."

As shown by the petition, the district attorney of San Diego County, on April 27, 1916, pursuant to the provisions of section 731 of the Code of Civil Procedure, commenced an action in the superior court of San Diego County entitled as above, the purpose of which was to secure an injunction against the doing of certain acts by defendants alleged to constitute a public nuisance, and thus abate the same.

In substance, the complaint filed in that action and made a part of the petition for the writ alleges that under a concession granted to defendant Joseph Weis by the Panama-California International Exposition said defendant is conducting upon what is known as the "Isthmus," in the exposition grounds, a public resort and place of amusement and entertainment designated and known as the "Sultan's Harem," which for an admission is open to the general public; that since about March 18, 1916, to the time of filing the complaint, said defendant Joseph Weis, as a part of the entertainment so given in said Sultan's Harem, has employed Jane Doe and Mary Roe as such employees to make, and who do make, in the presence of a large number of men, women, and children, a public exhibition and exposure of their naked persons and private parts thereof to those attending said place, and which exhibition, as alleged, is indecent and offensive to the senses; that such exhibition constitutes a public nuisance, and will continue to constitute such nuisance unless restrained by the court; followed by a prayer for an injunction.

The demurrer interposed to this complaint was overruled by the court, which, as alleged in the petition, threatens to and will, unless restrained by this court, grant an injunction as prayed for in the complaint.

The contention of petitioner is based upon the ground that a court of equity has no jurisdiction to enforce the criminal laws by injunction. We agree with counsel that the threatened acts described in the complaint, when committed, would constitute the crime of indecent exposure, as defined in section 311 of the Penal Code, for which, upon conviction, the law prescribes a penalty; and it is likewise true, as claimed, that courts of equity have no jurisdiction to enjoin the commission of acts merely because such acts when committed

would constitute a crime. Where, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. (*People v. Truckee Lumber Co.*, 116 Cal. 397, [58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374].) As well said in a concurring opinion by Judge Valliant in the case of *State ex rel. Attorney-General v. Canty*, 207 Mo. 439, [123 Am. St. Rep. 393, 13 Ann. Cas. 787, 15 L. R. A. (N. S.) 747, 105 S. W. 1078]: "A court of equity will not undertake to enforce the criminal law. Therefore, it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction, merely because the act when committed would be a crime. An act displayed before a public audience which is debasing in its character, debauching in its influence on public morals, and brutalizing in its effect on the spectators is a public nuisance, which a court of equity has jurisdiction to enjoin, and the court is not robbed of its jurisdiction merely because the act besides being a nuisance is also a crime." While the acts here complained of clearly constitute a crime, they also constitute a nuisance within the meaning of section 3479 of the Civil Code, which defines a nuisance as "Anything which is . . . indecent or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property. . . ." And section 3480 of the same code defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Mr. Joyce in his work on Nuisances (section 409) says: "A disorderly and disreputable theater may be enjoined, although a common nuisance." To the same effect is Wood on Nuisances (section 68), where it is said: "A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society." Says

the supreme court of Indiana, in *State v. Ohio Oil Co.*, 150 Ind. 21, [47 L. R. A. 627, 49 N. E. 809]: "Every place where a public statute is openly, publicly, repeatedly, consistently, and intentionally violated, is a public nuisance." (See, also, *Reaves v. Territory*, 13 Okl. 396, [74 Pac. 951]; *Commonwealth v. McGovern*, 116 Ky. 212, [66 L. R. A. 280, 75 S. W. 261]; *People v. Doris*, 14 App. Div. 117, [43 N. Y. Supp. 571]; *Farmer v. Behmer*, 9 Cal. App. 773, [100 Pac. 901]; *People v. Wing*, 147 Cal. 379, [81 Pac. 1103]; *State ex rel. Vance v. Crawford*, 28 Kan. 518, [42 Am. Rep. 182].) Not only as thus defined by text-writers and supported by decisions, but as declared in section 3479 of the Civil Code, any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance, and, under the provisions of section 731 of the Code of Civil Procedure, the district attorney is authorized to bring a civil action in the name of the people of the state to abate the same. That defendants are conducting, and will continue to conduct, before a public audience of men, women, and children, an indecent exhibition, debasing in character and well calculated to offend the senses and debauch the public morals of those who witness it, clearly appears. Why should the public be subjected to such baneful influence, when it can be protected by the preventive remedy of the court? Conceding that the injunctive process of the court should not issue to restrain the women there employed from making an indecent exhibition of themselves, since the threatened acts will be but a crime, nevertheless the defendant Joseph Weis, who is proprietor and conducts the place and employs them so to do, is subject to such process. The threatened acts if permitted will not only constitute a public nuisance, to be dealt with by the courts having jurisdiction over crimes, but will constitute a public nuisance, injurious to public morals and the good order of society, to prevent which a court of equity has jurisdiction in a civil action brought by the district attorney in the name of the people of the state, thus subserving the public morals and protecting men, women, and children attending this public resort as spectators from being subjected to witnessing the offensive and indecent exhibition which petitioner is con-

ducting and will, as alleged, continue to conduct, unless restrained by order of the court.

The application for a peremptory writ is denied and the proceeding is dismissed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1537. Third Appellate District.—June 14, 1916.]

**B. SCHNEIDER et al., Petitioners, v. J. O. MONCUR, Judge of the Superior Court of Plumas County, Respondent.**

**TRUST—CONVEYANCE OF REAL PROPERTY—SALE AND PAYMENT OF DEBTS OF GRANTOR—PROFITS DURING CONTINUANCE OF TRUST—FINDINGS—JURISDICTION TO ORDER SUBSEQUENT ACCOUNTING.**—In an action to have it declared that certain real property which included a running hotel and saloon business was conveyed to the wife of a debtor of the grantor upon the understanding of the debtor and grantor that the former was to sell the property, apply the proceeds in payment of such indebtedness together with certain other debts of the grantor, and pay to the grantor the residue, the finding that the debtor did not agree to pay to the grantor a fair or any proportion of the rents, issues, and profits of the property during the continuance of the trust, is not an express or explicit finding that no liability to account arose from the trust, and the court has jurisdiction to thereafter order an accounting to be made.

**APPLICATION** for a Writ of Prohibition originally made to the District Court of Appeal for the Third Appellate District.

The facts are stated in the opinion of the court.

H. B. Wolfe, for Petitioners.

L. N. Peter, U. S. Webb, and Robert T. McKisick, for Respondent.

**CHIPMAN, P. J.**—Plaintiffs bring the action to prohibit defendant from “compelling defendants or either of them to render an account of receipts and disbursements of and pertaining to a saloon and hotel business carried on by defend-

ants since the 14th day of February, 1910, in a certain action pending in the superior court of Plumas County and entitled 'Della R. Edwards, sometimes known as Della R. Harding, plaintiff, v. B. Schneider and Mrs. Abbie Schneider, defendants.' "

It appears from the petition that on January 4, 1913, respondent, as judge of said superior court, made and entered findings of fact and conclusions of law in the action above referred to and, on January 4, 1913, filed a decree therein. Among other facts it was found that, on February 14, 1910, plaintiff, Mrs. Edwards, was the owner of certain real estate (full description given) which included certain hotel property "and all furniture and fixtures therein and all personal property connected therewith used in the conduct and operation of the hotel on said property"; that, on said day, plaintiff, Mrs. Edwards, conveyed said property, by deed duly executed and delivered, to defendant, Mrs. Abbie Schneider, one of the petitioners herein; that, immediately after said conveyance was made, defendant in said action, B. Schneider, agreed with plaintiff, Mrs. Edwards, "to hold said property in trust for the plaintiff, and to sell the same, and then to pay to plaintiff the residue of the amount obtained at said sale after deducting the plaintiff's indebtedness to said defendant B. Schneider, and such sums as were paid by said B. Schneider to discharge the debts owed by plaintiff to divers other parties. . . . That said trust was, after the said conveyance and prior to the 1st day of May, 1910, declared by several written instruments subscribed by the said defendant, B. Schneider."

(These instruments do not appear in the petition.) It was further found: "That it is not true that defendant B. Schneider agreed with plaintiff to sell the said property for any given sum, or at any given time; and it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues and profits of said property during the continuance of the said trust." It was also found: "Sixth. That the said property was conveyed by plaintiff to the defendant, Mrs. Abbie Schneider, at the request of the defendant, B. Schneider, who then represented to plaintiff that that course would be safer than a conveyance direct to the said last named defendant; and the said conveyance was made with the understanding that the said Mrs. Abbie Schneider should acquire no title to said

property in her own right, and that the said property should be held in her name subject to the control of said defendant B. Schneider. That the said defendant, Mrs. Abbie Schneider, at the time of the execution of the said conveyance had full notice and knowledge of the conditions under which said conveyance was made." It was then found that defendant B. Schneider took possession of said property "and has since managed the same and has made no sale of said property or any part thereof." That, on or about October 15, 1911, "the said defendant B. Schneider repudiated the said trust." As conclusions of law the court found that defendants, the Schneiders, "should be declared trustees of said property, to have and to hold the same in trust for the plaintiff (Mrs. Edwards); that defendants should be required to sell the same at the earliest practicable date, and for the best available price, and after said sale to pay to plaintiff the residue . . . after deducting plaintiff's indebtedness to said B. Schneider and such other indebtedness as he had assumed, owed by plaintiff to other parties."

The court directed and entered what is termed an interlocutory decree in accordance with the findings of fact and conclusions of law. It will be observed that no accounting by the trustees was ordered by this decree.

It further appears that on February 19, 1915, on the petition of plaintiff, Mrs. Edwards, and in the same action, for an order "requiring defendants to render an account herein and for the recovery herein of the value of the use of the property described in the petition," and the "said matter having been submitted to the court and taken under advisement," the court found "all the allegations of the first, second, third, and sixth paragraphs of said petition are true." (The petition does not appear in the record.) Further, "that the said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since that said last named date said defendants have continued to and do now hold possession of the said trust property, but it is not true that such possession has been held without the consent of plaintiff, and it is not true that said defendants have dealt with and used the same for their own personal profit and advancement, or appropriated to their own use the rents, issues and profits thereof. It is true that defendants have neglected to account to plaintiff or to this court for any rents,

issues and profits of said property; that it is not true that the interests of defendants in said trust property are antagonistic to the interests of plaintiff therein, or that said defendants have taken no interest in said trust except for the purpose of obtaining from said property the amount of their own financial interest therein, or have taken no interest whatever in the right of plaintiff in said property. That it is true that defendants have endeavored to sell and dispose of said property in accordance with the terms of said judgment, and that they have been unable to sell or dispose of the same for a sufficient sum of money to enable them to recover the amount paid out by them in connection therewith as set forth in said judgment, and it is true that they have at all times used due and reasonable diligence and have used all possible efforts to sell and dispose of the said trust property." Further, "that the court is unable to determine from the evidence herein the value of the use of said property from February 14, 1910. That it is true that the cost for taxes and insurance on said property since February 14, 1910, is \$1120.00 per annum; that it is not true that said property does now or since said 14th day of February, 1910, has paid a profit over all expenses connected with the same of \$450.00 per annum.

"As conclusions of law from the foregoing facts, the court finds: 1. That the defendants should be required to render to this court within fifteen days, a full, true and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition. 2. That the defendants should not be removed from said trust at this time. 3. That plaintiffs should recover nothing from defendants at this time for the use of said property. Let a decree be entered accordingly."

No further proceedings appear until November 8, 1915, when an order was made by the court reciting that "the defendants having filed an account herein pursuant to the decision and decree made and filed in said matter on the 23d day of February, 1915 (the date of said order elsewhere appears to have been February 19), and plaintiff having filed a contest and objection to said account, and said matters coming on regularly to be heard upon the said account . . . and evidence having been introduced and it appearing to the court, from said evidence and from said account, that no

sufficient or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein; Now, therefore, it is ordered: That said account be, and the same is hereby declared to be an insufficient accounting of the receipts and disbursements, rents, issues and profits resulting from the carrying on of said trust, as referred to in said decision and decree. It is further ordered that said defendants be, and they are, hereby ordered to account to the court for all the receipts and disbursements, rents, issues and profits resulting from the operation of the said trust and that said defendants return to and produce before this court, on Thursday, the eleventh day of November, 1915, at ten o'clock A. M. at the court room of said court, all the books, accounts, checks, receipts and other evidences of the receipts or expenditures in anywise relating to or bearing upon the carrying on of said trust from the 14th day of February, 1910, to the date of the filing of plaintiff's petition herein for an accounting. Done in open court, this 8th day of November, 1915."

The ground upon which petitioners base their application for the writ is: "That the decree set forth in the application as of date January 4, 1913, . . . is a final adjudication of the matter and finally settles the rights of the parties; that this decree is not elastic and cannot be enlarged for the benefit of plaintiff nor can it be reduced or made effective for the benefit of defendants." The instruments creating the trust are not set forth in the application for the writ. We know nothing of the nature and extent of the trust except as we learn the facts from the findings and decree entered January 4, 1913, and the subsequent proceedings. Petitioners rely upon the following finding: "It is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues and profits of said property during the continuance of said trust." The concluding paragraph of the findings is as follows: "Let an interlocutory decree be entered accordingly." In the decree, which is entitled "Interlocutory Decree," the court adjudged and decreed "that the defendants be and they are hereby declared to be trustees of the property in plaintiff's complaint and herein described, to have and to hold the same in trust for the plaintiff and to sell the same at the earliest practicable date," and to discharge the debts owing by plaintiff and to

pay plaintiff any residue remaining after such payment; "that plaintiff is entitled to have such trust enforced by this court in this action" [a full description of the property follows], "together also with all and singular the tenements . . . and the rents, issues and profits thereof . . . also all the water, water rights, ditches, flumes, pipe lines, reservoirs, easements and appurtenances thereunto belonging or used and enjoyed in connection therewith; together also with all improvements thereon or any part thereof and all furnishings and fixtures therein and all personal property connected therewith used in the conduct and operation of the hotel on said property."

The petition or complaint, and answer if any there was, in the action in which the findings and decree of January 4, 1913, were made, do not appear. It is only by inference drawn from the findings that the liability of the trustees to account for the rents, issues, and profits of the property confided to their control and custody was a question then before the court. The property consisted in part of an equipped hotel and saloon, concededly an income producing property which was taken possession of and operated by the trustee. The court found "that immediately after the execution of said conveyance [the trust instruments] the said defendant B. Schneider took possession of said property, and has since been managing the same, and has made no sale of said property or any part thereof."

The finding now relied upon is not an explicit or express finding that no liability of the trustees to account for the rents, issues, and profits of the property arose from the trust. The finding is, "and it is not true that defendant B. Schneider agreed that he would pay to plaintiff a fair, or any proportion of the rents, issues, and profits of said property during the continuance of the said trust." This may mean that the trust conveyance contained no express agreement to pay to plaintiff the rents, issues, and profits. The court, by its subsequent orders, seems to have treated the issue as undetermined. In its decree following this finding no mention is made of the rents, issues, and profits of the property. If the court had intended to adjudge finally that the trustee named was relieved from any liability to account for rents, issues, and profits during his trusteeship, the decree should have so adjudged, for upon every principle governing trusteeship

there would be an implied duty so to account. It cannot be presumed that, in the absence of any provision in the instrument creating the trust so to account, the trustee could hold and enjoy the use and incomes of trust property for an indefinite period and account to no one. Distinctly, the duty of the trustee was to manage the property in the interest of the trustor as well as of all the creditors whom the trustee represented. Nothing short of an adjudication by the court that no such duty rested upon the trustee could relieve him therefrom. All the proceedings show that the trust was a continuing trust over which the court retained its power of direction and control when properly invoked. The decree shows that, for reasons then no doubt appearing, the trustee should not be removed; that he was not blameful for not having sold the property during the three intervening years. Why an accounting for rents, issues, and profits was not then ordered we do not know. We must presume that the court then found no necessity for so ordering. It will be observed that the property, the subject of the trust, is fully set forth in the decree and therein are mentioned, as part of the property, "the rents, issues and profits." The next step taken, so far as the record shows, was on February 19, 1915, on which date findings of fact and conclusions of law were made and entered, and decree entered in accordance therewith. These proceedings seem to have been taken in the same action as that in which the findings and decree of January 4, 1913, were made but apparently by a further petition. The pleadings are not set forth, but it appeared from recitals in the findings of fact that "a petition for an order requiring defendants to render an account herein" was heard, "upon testimony produced by plaintiff and defendants. The court found that "all the allegations of the first, second, third, and sixth paragraphs of said petition are true." What these paragraphs set forth does not appear. The court found further that "the said trust was created and the defendants accepted the same on the 14th day of February, 1910, and ever since said last named date said defendants have continued to and do now hold possession of the said trust property." The findings are set forth in full upon an earlier page of this opinion. It was found that "defendants have neglected to account to plaintiff or to this court for any rents, issues, and profits of said property," and as conclusions of law, among

others, it was found "that the defendants should be required to render to this court within fifteen days a full, true and correct account of all matters pertaining to said trust from February 14, 1910, to the date of the filing of said petition; . . . that plaintiff should recover nothing from defendants at this time for the use of said property." The decree ordered "that defendants render to this court within fifteen days from the date herein a full, true and correct account of all matters pertaining to said trust," etc.

On November 8, 1915, the court made and entered the order hereinabove set forth, and which is the order the enforcement of which petitioners now ask to have this court prohibit. The court therein recited that "defendants having filed an account in obedience to the order of February 23, 1915, . . . that no sufficient or any account has been filed herein in accordance with the decision and decree of this court heretofore made herein; Now, therefore, it is ordered . . . that said defendants be and they are hereby ordered to account to the court for all the receipts and disbursements, rents, issues, and profits resulting from the operation of said trust . . . and to return to and produce before this court . . . all the books, accounts, checks, receipts and other evidences of the receipts and expenditures in anywise relating to or bearing upon the carrying out of said trust from the 14th day of February, 1910, to the date of the filing of plaintiff's petition herein for an accounting."

The point now urged in support of the petition for the writ is that the court was without jurisdiction to make the order last above referred to, for the reason that by its order of January 4, 1913, it adjudged that the trust did not require an accounting of the rents, issues, and profits of the property; that such order was final, and the court thereby lost jurisdiction to impose upon the trustees the duty of rendering such account.

We cannot accede to this construction of the decree referred to or of the proceedings of the court in the matter. Apparently the principal purpose of the trust was to bring about a sale of the property and thereby the payment of the trustor's liabilities. In January, 1913, no sale had been effected, and the court refused to remove the trustees, being satisfied that they had used all proper efforts to effect a sale. In 1915 no sale had yet been made, and the court still retained its confi-

dence in the trustees and continued their trusteeship by refusing to remove them. But the court now believed that, after holding the property for five years, it was due to all parties interested that the trustees should render an account of receipts and disbursements, as we think the court had the power to do. We cannot assume, as petitioners seem to fear, that they will be unnecessarily annoyed in being obliged to bring into court the evidences of their transactions respecting the property. It must be presumed that at the hearing the court will hold the scales of justice at equipoise and accord to all the parties alike the equal protection of the law. Petitioners may have adjudicated all their rights involved at the hearing and fully preserved, for review if necessary, by the record therein made. It may turn out that the necessary expenses and disbursements and just compensation to the trustees in administering the trust will exceed the receipts, but with the result, whatever it may be, the court cannot now concern itself.

The writ is denied.

Hart, J., and Ellison, J., *pro tem.*, concurred.

---

[Civ. No. 1519. Third Appellate District.—June 14, 1916.]

W. W. COLM, Appellant, v. MARY F. FRANCIS, Respondent; WEST VIRGINIA OIL COMPANY, Defendant.

**SPECIFIC PERFORMANCE—CONTRACT FOR LEASE OF LAND—PLEADING—SUFFICIENCY OF COMPLAINT—CONDITIONS TO EXECUTION—CONSTRUCTION OF CONTRACT.**—A complaint in an action for the specific performance of a contract for a lease of land for the purpose of exploring the same for oil is not subject to general demurrer on the ground that it disclosed that the lease was to be executed only when the patent to the land had been issued and the land conveyed to the defendant, where it is alleged that such defendant had received a conveyance of such land after the issuance to his grantor of the final receipt of the receiver of the United States land office for a patent to such land, and it appears from the contract that no express reference is made therein to a patent, but the execution of the lease was made dependent upon "the consummation of the patent proceedings."

**ID.—CONTRACT TO SELL TO THIRD PARTY—SUFFICIENCY OF COMPLAINT—**  
**—CONSUMMATION OF SALE NOT SHOWN.**—In such an action the complaint is not subject to general demurrer in alleging that the defendant, previous to the commencement of the action, made a transfer of all her interest in the property to a third party, where there is no further averment that she had disposed of or sold the land.

**ID.—CONTRACT FOR LEASE OF OIL LANDS—SUFFICIENCY OF CONSIDERATION—DEVELOPMENT WORK.**—“Development work” already performed and to be performed is a sufficient consideration to support a contract for a lease of lands for the discovery of oil.

**ID.—LEASE—ADEQUACY OF CONSIDERATION.**—An agreement on the part of the lessee of oil land to do all work at his own expense, pay all taxes on the personal property, and pay to the lessor as rent or royalty one-eighth of all the proceeds of oil produced, constitutes a fair, just, and reasonable consideration for the lease.

**ID.—PLEADING—SUFFICIENCY OF COMPLAINT—TRUTH OF FACTS.**—In passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue.

**ID.—SPECIFIC PERFORMANCE OF CONTRACT—ADEQUACY OF CONSIDERATION—PLEADING AND EVIDENCE.**—Adequacy of consideration for a contract whose terms are sought to be enforced through a decree of a court of equity must be pleaded and proved.

**ID.—PUBLIC LANDS—RECEIVER'S FINAL RECEIPT—CONVEYANCE OF EQUITABLE TITLE.**—The issuance to an applicant for a patent to government land of the receiver's final receipt constitutes a conveyance to him by the government of the equitable title, and thereafter the government, until patent is issued, holds the legal title as a mere trustee for the applicant without any further proprietary interest in the land.

**APPEAL** from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

T. N. Harvey, for Appellant.

Matthew S. Platz, for Respondent Mary F. Francis.

Geo. E. Whitaker, for Defendant West Virginia Oil Company.

**HART, J.**—This is a suit for the specific performance of a certain contract for a lease, or, more accurately speaking, to

compel the defendant, Mary F. Francis, to execute a lease of certain land to the plaintiff in accordance with the terms of a certain written agreement, to be hereafter more specifically referred to.

The said defendant (respondent herein) demurred to the complaint on general and special grounds. The demurrer was sustained and, the plaintiff refusing or failing to amend, judgment was thereupon entered against him and in favor of the respondent.

This appeal is brought here by the plaintiff from said judgment.

The case as made by the complaint is this: That one P. J. O'Brien and one F. P. Francis, both residents of Kern County, each claimed, adversely to the other, to be the owner and holder of the possessory title to certain government lands in Kern County, "under and by virtue of certain mineral locations and mesne conveyances of the same"; said lands being described in the complaint as the northeast quarter and the southeast quarter of section 6, township 11 north, of range 23 west, San Bernardino meridian; that said O'Brien and Francis, on the tenth day of September, 1908, entered into a certain written agreement, which was filed for record in the office of the county recorder of Kern County on the nineteenth day of October, 1908, and which agreement, in substance, recited and covenanted as follows: That one Edward Fox was desirous and willing to exploit said northeast quarter and develop the mineral deposits supposed to be contained therein, consisting of crude petroleum, "for and in consideration of his receiving a deed of grant, bargain and sale to the northeast and southwest quarters of said northeast quarter," in accordance with the terms of a certain agreement entered into between said P. J. O'Brien and said Edward Fox on the twenty-sixth day of July, 1908; that "whereas, it is deemed advisable and to the best interests of the parties hereto that an amicable adjustment be made of the conflicting claims of said parties to the lands in question and hereinabove described and that litigation be avoided." Then follows a covenant whereby Francis was to receive, from the land allotted to O'Brien in each of the quarter-sections named, thirty-five acres, and was to have the first claim or selection of thirty-five acres in either the one or the other of said sections, and O'Brien was, after such selection by Francis, to have the right

to exercise his selection of the forty-five acres in the other quarter-section, in each case the selection to embrace one solid piece or parcel of land; that, after the execution of the said agreement, and on the sixteenth day of November, 1908, the said Francis, as party of the first part, entered into an agreement in writing with the said Edward Fox, as party of the second part, which agreement was filed for record in the office of the county recorder of Kern County, on the twenty-first day of January, 1909. In said agreement, which is set out in the complaint *in haec verba*, it was recited, covenanted, and agreed: That, whereas, said O'Brien and Francis are owners as tenants in common of the said northeast quarter of said section 6, and that "development work for oil upon said land is now being carried on and performed by the party of the second part; that, upon the discovery of oil in paying quantities, by reason of said development work, patent proceedings are to be instituted by said Francis and O'Brien for the purpose of procuring a United States patent to the land hereinabove described"; that by the said agreement between Francis and O'Brien, there were to be conveyed to and vested in the former, "upon the consummation of the patent proceedings above referred to," thirty-five acres of said quarter-section; that "it is not yet determined out of what particular portion of said northeast quarter of said section 6 the said thirty-five acres so to be conveyed to and vested in said Francis are to be taken or segregated; that, "for and in consideration of the said development work, performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section six hereinabove described and for other good and sufficient considerations moving from the party of the second part to the party of the first part, the party of the first part hereby agrees, that when said thirty-five acres of land so to be conveyed to and title vested in him as aforesaid, is segregated from the remaining portion of said northeast quarter of section six, and conveyed to and vested in him, he will execute and deliver to said party of the second part an Indenture of Lease of said thirty-five acres of land, which said Indenture of Lease shall embody among others, the following provisions, to-wit: That the said party of the first part, as lessor, shall lease, demise and let unto the said party of the second part, as lessee, the said thirty-five acres of land, being a portion of said north-

east quarter of said section six, hereinbefore referred to, together with the exclusive right to mine, dig, excavate, bore, and drill for and otherwise to collect, develop and obtain petroleum oil, natural gas, naphtha, and other hydro-carbon and kindred substances, and also water, and the right to sever and remove said substances from said lands, also to construct, maintain and use over and upon said land, roads, pipe lines, telephone lines, storage tanks, engines, machinery, and other structures."

Subsequent to the making of the foregoing agreement, the said F. P. Francis died, his estate was administered upon by his widow, Mary F. Francis, the respondent herein, and, by a decree of the superior court of the county of Kern, sitting in probate, made and entered on the thirteenth day of July, 1910, said estate, including the interest of her deceased husband in and to the agreement of September 10, 1908, between the said deceased and the said O'Brien, concerning the land described in the complaint, was distributed to the said Mary F. Francis.

It is further alleged that subsequent to the making of the agreement between the said Fox and the said Frank P. Francis, and after the death of the latter, the said Fox discovered crude petroleum in large and paying quantities in and upon the said northeast quarter of the said section 6; that upon the said discovery of crude petroleum oil, application for a United States patent to said northeast quarter was made by said P. J. O'Brien, "and after proceedings had and taken in the United States Land Office at Los Angeles, California, the Receiver's final receipt on said application for a patent was duly issued to said P. J. O'Brien for said northeast quarter of section six; that, at or about the time of the issuance of said receiver's final receipt above referred to, the said P. J. O'Brien conveyed to the said defendant, Mary F. Francis, as successor in interest of the estate of the said F. P. Francis, deceased, in accordance with the terms of the agreement made by him with said Francis," thirty-five and fourteen-hundredths acres of the land described in the complaint, said thirty-five acres and fraction of an acre being specifically described in the complaint.

On the second day of July, 1909, the said Edward Fox by an instrument in writing transferred and assigned all his right, title, and interest in and to said agreement of Novem-

ber 16, 1908, between himself and the said Frank P. Francis, to one Lewis Hicks, the said transfer having been, on the sixth day of July, 1909, recorded in the office of the county recorder of Kern County; and, on the twenty-eighth day of June, 1912, Hicks, by an instrument in writing, transferred and conveyed the said agreement and all rights thereunder to the plaintiff and appellant herein.

It is charged that, after the estate of F. P. Francis, deceased, was distributed to the defendant, Mary F. Francis, and subsequent to the issuance of the United States receiver's final receipt and the conveyance by the said P. J. O'Brien to said Mary F. Francis of the thirty-five acres of land above mentioned, "and notwithstanding the existence of said agreement of lease, which has never been canceled, vacated or set aside, and of which agreement of lease the said defendant, Mary F. Francis, had actual as well as constructive knowledge at all times herein mentioned, the said defendant, Mary F. Francis, entered into a contract of sale with one E. S. Good, by which the said defendant, Mary F. Francis, agreed to sell to the said E. S. Good the above mentioned and described land for the purpose of drilling and operating the same for the production of oil therefrom"; that, in accordance with said agreement to sell, the said defendant placed the said Good in possession of said land; that said Good has assigned and transferred all his title and interest in and to said agreement to sell to the defendant, West Virginia Oil Company, which company "has at all times since said assignment been in the occupancy and possession of said described land and claiming some right, title and interest in said land, but plaintiff alleges that the same is without right or merit and is subject and subordinate to plaintiff's rights in said lease and said described land."

The plaintiff states that, on or about the twenty-sixth day of September, 1912, he made a demand on the respondent for a lease of said thirty-five acres in accordance with the terms of the written agreement of November 16, 1908, but that she has ever since failed and refused, and still fails and refuses, to execute an agreement of lease to the plaintiff; that plaintiff has at all times since the assignment of the said agreement to him been ready and willing "and is now ready and willing to perform all of the terms and conditions of said lease to be by him performed as lessee."

The statement of the alleged special grounds of demurrer, so far as the first specification is concerned, is wanting in clearness. While the first and second specifications declare that the complaint is ambiguous and unintelligible, and that the court has no jurisdiction over the subject matter of the action, they in fact involve objections to the complaint on general rather than special grounds. More explicitly speaking, the necessary legal effect of the demurrer in those particulars is that the complaint is insufficient in the statement of a cause of action, because it discloses that the lease was to be executed only when the patent to the land described in the complaint was issued to O'Brien and after he had conveyed to Francis the particular thirty-five acres of land which their agreement of September 10, 1908, called for, and that it does not appear from the complaint that either a patent or the receiver's final receipt on the application of a patent to said land had been issued to O'Brien or to any other person, or that the land had been segregated and the parcel to which Francis was entitled conveyed to him by O'Brien in pursuance of the terms of said agreement.

The averments relative to the alleged contract by the defendant to sell the land to the said E. S. Good, as well as those relative to the alleged transfer of the said agreement to sell to the defendant, West Virginia Oil Company, are also challenged as being enveloped in ambiguity and characterized by unintelligibleness. The complaint, in the particular referred to, is not amenable to the objection thus made. It is true that the agreement to sell was not set out in full in the complaint, as counsel for the respondent seems to think ought to have been done. But it was within the rights of the plaintiff to plead said contract in a manner consistent with the dictates of his own judgment, so long as he made it clearly to appear in his complaint that such a contract had been made, and that under it claims were made to the property in question adverse to his alleged rights therein. And the complaint does clearly show that such a contract had been made, was still in existence, and that under it the West Virginia Oil Company claims an interest in the premises in dispute adversely to the plaintiff's claim of interest in said property under the contract for a lease.

The most important points urged here, however, are that the complaint does not state a cause of action for the relief

herein sought, because it fails to disclose that the conditions upon which the lease was to be made and delivered to Fox or his assignees had taken place or been complied with, and because, further, it fails to show an adequate consideration either for the contract for a lease or for the lease itself. It is further contended that the defendant, Mary F. Francis, is not a real party in interest.

These contentions are without legal force, and the demurrer was, therefore, erroneously sustained.

The theory of the respondent is that, under the terms of the contract between Francis and Fox, the latter could acquire no right to the lease until a patent to the land in question had actually been issued by the government to O'Brien. But there is no language in the contract between Francis and Fox which requires that instrument to be construed to mean that, as a condition precedent to the execution of the lease or to the right of Fox to compel the execution of the lease, a patent must have actually been issued to and received by O'Brien to the lands described in the complaint. The contract itself makes no express reference to a patent. The language of the preamble to the contract, viz., that the thirty-five acres were to be conveyed to and vested in said Francis "*upon the consummation of the patent proceedings,*" does not say, nor do we believe it may reasonably be held to have been intended to say, that the actual issuance of a patent by the government should have taken place as a condition to the execution of the lease. Indeed, the "*consummation of the patent proceedings*" by the applicant could have gone no further than establishing his right to a patent—he could not himself, quite obviously, issue the patent. All that the contract called for, so far as was concerned Fox's right to a lease from Francis, was that the latter should acquire title to the thirty-five acres of land selected by him, and that he did acquire a title to thirty-five acres of land, which were selected and segregated from the northeast quarter of section 6, and conveyed to the successor in interest to his estate, the complaint very clearly discloses. That pleading, as has been shown, alleges that, upon the discovery of crude petroleum oil on the northeast quarter of section 6, due proceedings were had in the United States land office for the acquirement of a patent to said land, and thereupon the receiver's final receipt entitling the applicant to a patent "*was duly issued to the*

said P. J. O'Brien for said northeast quarter of said section 6," and that "at the time of the issuance of said receiver's final receipt" O'Brien conveyed to the respondent, as the successor in interest in the estate of her deceased husband, thirty-five acres out of the said northeast quarter.

The issuance to O'Brien of the receiver's final receipt constituted a conveyance to him by the government of the equitable title to the land. Until the patent was issued, the government was, of course, the holder of the legal title, but it held it as a mere trustee for O'Brien, and no longer had a proprietary or, indeed, any interest whatever in the land itself. The discharge of its trust lay in the mere ministerial act of its officers charged with that duty in issuing the patent—the mere evidence of O'Brien's ownership in fee of the land. O'Brien's title, so far as dominion over it was concerned, became complete when he received the final certificate of the receiver.

The foregoing views are sustained by the decisions of the courts as well as by the adjudications of the land department of the government.

In *Barney v. Dolph*, 97 U. S. 652, 656, [24 L. Ed. 1063], it is said: "When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

In a case before the Interior Department—*Aspen Cons. Gold Min. Co. v. Williams*, 27 Land Dec. 16—Secretary Bliss said: "Where an entry and final certificate are obtained by compliance with the public land laws, the right of the entryman or purchaser is complete, and his right or title will not be impaired by any delay in issuing the patent, and when issued the patent will relate back to the date of the entry or purchase and give effect thereto from that time." (See, also, *Carroll v. Safford*, 3 How. 441, 461, [11 L. Ed. 671]; *Witherspoon v. Duncan*, 4 Wall. 210, 218, 220, [18 L. Ed. 339]; *Stark v. Starr*, 6 Wall. 402, 418, [18 L. Ed. 925]; *Amador Medean Gold Min. Co. v. South Hill Gold Min. Co.*, 13 Sawy. 523 [36 Fed. 668].)

Again, in *Harkrader v. Goldstein*, 31 Land Dec. 93, Acting Secretary Ryan said: "Having complied with all the terms

and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises in the first instance having accepted his proof and issued final certificate of entry thereon, the town site entryman and those for whom he was trustee had upon the face of the record acquired a *vested interest* in the land, and under the law had become *prima facie* the equitable owners thereof and entitled to a patent." (See, also, *Kern Oil Co. v. Clarke*, 30 Land Dec. 550; *Skinner v. Fisher*, 40 Land Dec. 112; *In re Southern Pac. R. R. Co.*, 32 Land Dec. 51, 64; *Wirth v. Branson*, 98 U. S. 118, 121, [25 L. Ed. 86]; *Simmons v. Wagner*, 101 U. S. 260, 261, [25 L. Ed. 910].)

It is true that the government has it within its power to refuse, for sufficient reasons—for instance, for fraud in the procurement of the final certificate—to issue a patent after the final certificate therefor has been issued, but, in the absence of a showing that some reason exists for the withholding of or refusal to issue a patent, it cannot be assumed that the government has the legal right to do so, nor that, a final certificate for the land having been issued, the issuance of a patent will not follow in due course.

Thus it will be observed that O'Brien, having acquired an equitable title to the northeast quarter of section 6, conveyed to Mrs. Francis, as the successor in interest to her deceased husband, a similar title to thirty-five acres carved out of said quarter-section, in accordance with the terms of the contract between O'Brien and her husband. The contract between Francis and Fox does not call for any particular kind of title—that is, it does not provide, as one of the conditions upon which Fox would be entitled to a lease of Francis' thirty-five acres, that the latter should first have vested in him a *legal* title to the land. It merely provides that title to the land shall be vested in him—a title which, whether legal or equitable or both, would vest in him full dominion over the land so conveyed, with the power and right to dispose of it as he pleased. And, as by the receiver's final certificate and O'Brien's conveyance, such a title was vested in Francis or in his successor in interest, it follows, of course, that that one of the several conditions upon which Fox was entitled to the lease under his contract with Francis had been complied with.

The construction thus given the contract for a lease harmonizes with the practical construction to which the parties themselves subjected the contract between O'Brien and Francis. Upon the issuance of the receiver's final receipt to O'Brien, Mrs. Francis, in the exercise of her right under said contract to a first selection of thirty-five acres out of the northeast quarter, selected and had set off to her said thirty-five acres, and O'Brien conveyed the same to her and she accepted the conveyance—all this, in pursuance of said contract between O'Brien and Francis, the language of which, so far as that particular part of it was concerned, was followed by the contract for the lease.

Counsel for the respondent has filed with the papers in this case (not contained in the transcript on appeal) a certified statement by the register of the United States land office at Los Angeles, dated June 9, 1913, in which that officer declares that as a matter of fact no final certificate has ever been issued out of said office for the said quarter-section, and in effect makes the singularly novel proposition that, in determining whether the complaint is wanting in the statement of a cause of action because no title of any character to said land has vested in Francis or O'Brien, this court may, by virtue of the provisions of section 1875, subdivision 3, of the Code of Civil Procedure, take judicial notice of the fact that no final certificate has ever been issued out of said land office for a patent to said land, and to aid it the court may inspect or examine the said certified statement of the register. The proposition is so obviously unsound that it would seem that no notice should be given to it. However, counsel makes the point and the obvious reply is that the rule referred to is one of evidence and not of pleading. It is only the statement of a proposition plainly within the realm of commonplaces to say that, in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or inartificial statement of the facts, must stand or fall by its own force. Nothing *dehors* the pleading itself can

be considered to determine whether it is obnoxious to objections made against it as a pleading.

It is next contended that the complaint shows that the defendant, Mary F. Francis, previously to the commencement of this action, had transferred her right, title, and interest in and to the premises in question to one Good, that she now has no interest in the property to which the lease relates, that she is not the real party in interest, and that, as to her, specific performance of the contract for a lease is impossible. The complaint does not state that Mrs. Francis had disposed of or sold the land in question. It alleges that she entered into a contract with said Good whereby she agreed to sell to him the thirty-five acres, and that Good transferred said contract and his right to purchase thereunder to the defendant, West Virginia Oil Company. No sale of the property by virtue of the terms of said contract had been consummated, so far as the complaint shows. Mrs. Francis, being still the owner of the property, is, of course, legally capable of executing the lease. It was manifestly proper to make the defendant, West Virginia Oil Company, a party defendant, since it claimed some interest in the property by reason of the agreement to sell.

The last point made is that the contract for the lease is not supported by a consideration, and that the consideration moving to Francis for the execution of the lease is not shown by the complaint to be adequate.

The rule that adequacy of consideration for a contract whose terms are sought to be enforced through a decree of a court of equity must be pleaded and proved is not only expressly declared by our code (Civ. Code, sec. 3391), but is so firmly settled by the authorities that it is unnecessary to cite any upon that proposition. And we think it is made very clear by the complaint in the case at bar that that rule, so far as pleading is concerned, has been fully complied with both as to the contract which constitutes the basis of this action and the proposed lease. The contract for the lease recites that "for and in consideration of the said development work performed and to be performed by the said party of the second part upon and for the benefit of said northeast quarter of said section hereinabove described and for other good and sufficient considerations moving from the party of the second part," etc. Thus it will be noted that one of the

considerations for the contract of lease was "development work" already performed by Fox, and this itself was a consideration sufficient to support said contract. As to the lease itself, the contract provides that the lessee shall do all the work of drilling wells, furnish all the labor and materials and machinery, and erect structures and such other appurtenances as may be necessary for the production of oil in paying quantities, pay all taxes on all the personal property on the premises, including the machinery and structures referred to, and pay to the lessor, "as rent or royalty for said lands, one-eighth of all the proceeds of oil or other substances which may be produced or saved from the premises, and from the wells therein, less the amount consumed in production"; that the royalty so due and to be paid to the lessor by the lessee shall be paid in products or cash at the option of the lessor, the latter to furnish the lessee with a monthly statement showing production of oil and other substances from the land. We cannot say that this does not constitute a fair, just, and reasonable consideration. At any rate, on the face of the complaint it appears to be adequate and equitable.

The judgment is reversed, with directions to the court below to allow the respondent such time within which to answer the complaint as to it may appear reasonable.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 10, 1916.

[Civ. No. 1783. First Appellate District.—June 15, 1916.]

**CLARENCE C. BURR, Respondent, v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Appellants.**

**TAXES ILLEGALLY COLLECTED—DEMAND FOR PAYMENT—MANDAMUS—PLEADING—SUFFICIENCY OF COMPLAINT.**—In a suit for a writ of *mandamus* to compel the supervisors of the city and county of San Francisco to approve and allow a claim for the payment of a judgment for the recovery of taxes illegally collected by the city and county, where the complaint set forth with great circumstantiality the history and nature of the claim, and after doing so averred plaintiff "presented his claim and demand to said board," the statement sufficiently shows that it was the detailed claim and demand of plaintiff which was brought before the board for its approval, and the complaint was sufficient as against either a general demurrer or a special demurrer for uncertainty.

**Id.—CLAIM NOT PAYABLE OUT OF PARTICULAR FUND—APPROVAL BY BOARD.**—The claim for payment of a judgment for the recovery of certain taxes illegally collected by the city and county of San Francisco is one which is not required to be payable out of the revenues of any particular year or fund, but is a claim that the board of supervisors is bound to audit and approve, and the city is required to pay, irrespective of the provisions of the charter relative to the incurring of indebtedness or payment of claims in excess of the revenues of the city for any particular year.

**Id.—PRESENTATION OF CLAIMS TO SUPERVISORS—USUAL PRACTICE—MANDAMUS.**—Where the usual procedure in the city and county of San Francisco with reference to the allowance and payment of claims is that they shall first be presented to the board of supervisors for its approval, which procedure plaintiff pursued on a claim for payment of a judgment for the recovery of taxes illegally collected by said city and county, plaintiff is entitled to a writ of *mandamus* requiring the board to follow the usual custom in this respect.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney, and Harry G. McKannay, Assistant City Attorney, for Appellants.

Drown, Leicester & Drown, for Respondent.

**THE COURT.**—This is an appeal from a judgment directing the issuance of a peremptory writ of mandate, commanding the defendants, as members of the board of supervisors of the city and county of San Francisco, to approve and allow the claim and demand filed with said board by the plaintiff, for the payment by said city and county of a judgment for the recovery from said corporation of certain taxes illegally collected by it.

It is the contention of the appellants that its demurrer to the complaint upon the ground of uncertainty should have been sustained, said uncertainty consisting in the absence from said complaint, as appellants insist, of a statement of the nature of the claim and demand, the detail of which was presented to the board of supervisors. An examination of the complaint, however, shows that the pleader set forth with great circumstantiality the history and nature of his claim, and after doing so averred that "he presented his claim and demand to said board." We think this statement sufficiently shows that it was the detailed claim and demand of the plaintiff which was before the board for its approval, and that the complaint was therefore sufficient as against either a general or special demurrer.

We are of the opinion also that the claim and demand of the plaintiff was one which was not required to be payable out of the revenues of any particular year or fund, but was a claim that the board of supervisors was bound to audit and approve, and that the city was required to pay, irrespective of the provisions of the charter relative to the incurring of indebtedness or payment of claims in excess of the revenues of the city for any particular year.

The final contention of the appellants is that this claim being of that nature, was not one which it was requisite should be presented to the board of supervisors at all, and hence that they were not called upon to act upon or approve it. It is conceded, however, that the usual procedure in said city with reference to the allowance and payment of claims is that they shall first be presented to the board of supervisors for its approval, and that the plaintiff herein was pursuing such procedure. This being so, he was entitled to have the writ issued requiring the board to follow the usual custom in respect to the approval and payment of claims against said city.

Judgment affirmed.

[Civ. No. 1779. First Appellate District.—June 15, 1916.]

**JOEL ROULLARD, Respondent, v. DONLEY C. GRAY,  
Appellant.**

**CONTRACTS—HUSBAND AND WIFE—SECTION 158, CIVIL CODE.**—Under section 158 of the Civil Code a husband or wife may enter into any engagement with the other or with any other person respecting property which either might if unmarried.

**ID.—SALE OF AUTOMOBILE TO WIFE—NONLIABILITY OF HUSBAND—EVIDENCE.**—In an action against the husband to recover the balance due on an automobile purchased by his wife, evidence of an offer on the part of the husband to compromise the claim is insufficient to show his liability thereon, there being no delegation of authority by him to his wife to represent him generally or in the particular transaction.

**ID.—AUTOMOBILE NOT NECESSARY OF LIFE—ABSENCE OF AUTHORITY OF WIFE—HEARSAY EVIDENCE.**—An automobile cannot be deemed one of those necessities of life that a wife is authorized to purchase upon her husband's responsibility, and therefore she has no implied authority to represent him in such purchase, and evidence of what she said when she purchased the machine is hearsay and inadmissible against the husband.

**ID.—PLEADING—AMENDMENT—SAME CAUSE OF ACTION.**—Where the original complaint in such an action was founded upon a promissory note given for the balance of the purchase price of the automobile, an amended complaint setting forth a cause of action for goods sold and delivered does not contain a different and new cause of action.

**APPEAL** from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Larkins & Bailey, for Appellant.

Kitt Gould, and C. K. Bonestell, for Respondent.

**THE COURT.**—This is an action to recover the balance due on account of the sale of an automobile alleged to have been made by the Roullard-Brown Auto Company to the defendant, the account having been assigned to the plaintiff.

The transaction for the purchase of the automobile was conducted by Hazel I. Gray, the wife of the defendant, and as



part of the purchase price the sellers took her promissory note for \$440; the machine was delivered to her, and the balance due thereon, as evidenced by the note, was charged to her personally upon their books. Notwithstanding these facts the plaintiff seeks to hold the defendant upon the contract.

A husband or wife may enter into any engagement with the other or with any other person respecting property which either might if unmarried. (Civ. Code, sec. 158.) It would appear from what is above narrated that the transaction was one between defendant's wife and the vendors of the automobile, for which she alone was responsible. The only evidence in the case tending to show that Mrs. Gray was acting on behalf of the defendant in the transaction consists of two inferences to be drawn, one from a letter written by him, and the other from an admission claimed to have been made by him to one of the plaintiff's assignors, and an offer on the part of the defendant to compromise the claim. Evidence of this offer went in without objection, and was made, according to a declaration imputed to the defendant, with a view to help reach a settlement of domestic troubles which he was having at the time with his wife. As to the inferences just referred to, they are as consistent with the claim that the automobile was the property of Mrs. Gray as with any other theory; but assuming that the court was warranted in construing the offer to compromise and claimed admissions against the defendant, still we think they amounted to no more than slight evidence insufficient to support the findings. (Code Civ. Proc., sec. 1835.) There was no evidence introduced at the trial that there was any delegation of authority from the defendant to his wife to represent him generally or in this particular transaction; and as, under the circumstances of this case, an automobile cannot be deemed one of those necessities that a wife is authorized to purchase upon her husband's responsibility, it follows that she had no implied authority to represent him; hence evidence of what she said when she purchased the machine was hearsay and inadmissible as against the defendant.

With regard to the original complaint, considering it as being founded upon the promissory note alone, still it will not be held that plaintiff, in setting forth in the amended complaint an action for goods sold and delivered, has declared upon a different and new cause of action. A declaration

counting on a specialty, as a note, may be substituted for one in the form of a common count, the cause of action being the same. (*Vaughn v. Rugg*, 52 Vt. 235; *Schieffelin v. Whipple*, 10 Wis. 72; *Nelson v. Webb*, 54 Ala. 436; *Gray v. Bass*, 42 Ga. 271; *Clarkson v. Morrison*, 24 Mo. 134; *Born v. Castile*, 22 Cal. App. 282, [134 Pac. 347]; *Redington v. Cornwell*, 90 Cal. 49, [27 Pac. 40]; *Vancleef v. Therasson*, 20 Mass. (3 Pick.) 12; *Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100].) In a suit on a written contract for the construction of a building, the plaintiff may be allowed to amend at the trial by adding a *quantum meruit* count for labor and materials furnished. (*School Dist. etc. v. Boyer*, 46 Kan. 54, [26 Pac. 484].) In New York it has been held that in an action on a note an amendment of the complaint by inserting a count for goods sold and delivered which formed the consideration of the note may properly be allowed at the trial, it being in furtherance of justice and not changing substantially the plaintiff's claim. (*Vibbard v. Roderick*, 51 Barb. (N. Y.) 616.)

The judgment is reversed.

---

[Civ. No. 1843. First Appellate District.—June 15, 1916.]

KATE HUFFMAN, Respondent, v. PETER KNAPP et al.,  
Appellants.

**FORECLOSURE OF MORTGAGE — FALSE REPRESENTATIONS — EVIDENCE — AGENCY.**—In an action to foreclose a mortgage securing three promissory notes given as part consideration on an agreement for the exchange of lands, where the defendants pleaded that they were induced to execute the notes and mortgage by false representations made to them by a party negotiating the exchange, evidence as to the alleged fraud was inadmissible in the absence of a foundation showing that the relation of principal and agent existed between plaintiff's assignor and the one claimed to have made the false representations, or, in support of the theory of ratification, that the plaintiff's assignor accepted the fruits of the transaction with knowledge of these material facts. The mere acceptance of the fruits of the transaction does not constitute ratification, nor is such acceptance, standing alone, any evidence of ratification.

**APPEAL** from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

Gallaher, Aten & Devaul, for Appellants.

Harris & Hayhurst, for Respondent.

**THE COURT.**—This is an appeal from an order denying the defendants a new trial and from a judgment entered in favor of the plaintiff in an action to foreclose a mortgage executed by the defendants in the usual and ordinary form to plaintiff's assignor, as security for the satisfaction of three promissory notes of the defendants aggregating the sum of seven thousand seven hundred dollars.

The notes contemporaneously with the mortgage were executed by the defendants to plaintiff's assignor as payment for the difference due under the terms of an exchange agreement, wherein and whereby plaintiff's assignor transferred to the defendants some forty acres of land situated near Clovis, Fresno County, in consideration of the notes and mortgage and the transfer by the defendants to plaintiff's assignor of a five-acre orange grove, subject to a one thousand dollar mortgage situated near the town of Glendora, California. The defendants having defaulted in the payments due under the mortgage, plaintiff elected, as the mortgage permitted, to declare the whole debt due and payable, and accordingly instituted foreclosure proceedings. The defendants Knapp answering and cross-complaining admitted the making of the exchange agreement and the execution of the notes and mortgage as alleged in the complaint, but pleaded that they were induced to enter into and execute the same by false and fraudulent representations made to them by the agent of plaintiff's assignor concerning the character, quality, and value of the land covered by the mortgage, the age of the trees and vines growing thereon, and the annual income which the land had produced and would produce. Upon the trial of the case the evidence disclosed that the alleged false representations were made by one W. L. Chappel; and it was the contention of the defendants that he was the agent by direct authority

of the plaintiff's assignor in the negotiations which culminated in the exchange of the properties; and that in any event the subsequent ratification of his conduct by plaintiff's assignor made the latter responsible to the defendants. The record discloses evidence sufficient to support the finding of the trial court that the relation of principal and agent did not exist prior to and at the time of the exchange between plaintiff's assignor and Chappel; indeed, it was in effect conceded by defendants' counsel during the progress of the trial that the agency, if any, relied upon to support the defense pleaded was not created by previous authorization, but if it existed at all, resulted from subsequent ratification. Upon the assumption that such ratification had been established, the defendants endeavored to introduce evidence of the false representations alleged to have been made to them by Chappel. The trial court, however, upon the objection of the plaintiff, rejected such evidence upon the ground that no proper foundation therefor had been laid, in this, that it was not shown that the relation of principal and agent existed between plaintiff's assignor and Chappel, or that the former accepted the fruits of the exchange with knowledge of the fact that the alleged fraudulent representations were the inducing cause of the defendants entering into the exchange agreement and subsequently executing the notes and mortgage. Undoubtedly it was incumbent upon the defendants to establish the existence of the relation of principal and agent between plaintiff's assignor and Chappel before evidence as to what the latter had stated and done during the negotiations would be admissible for any purpose; and failing in this it was an essential prerequisite to the admissibility of the proof proffered in support of the theory of ratification to show that plaintiff's assignor accepted the fruits of the transaction with knowledge of its material facts. This is elementary; and the rule is thus because ratification necessarily presupposes a knowledge of the thing ratified. Manifestly, the alleged fraudulent representations sought to be shown in evidence in the present case were, in so far as the defense pleaded was concerned, the material facts of the transaction. The mere acceptance of its fruits did not constitute ratification, nor was such acceptance standing alone any evidence of ratification. Upon this phase of the case the evidence at its best shows that Chappel was nothing more than a mere go-between for the de-

defendants and plaintiff's assignor, who, when brought together, proceeded to make, and did make, their own bargain for the exchange of their respective properties; and it is not claimed, nor does the evidence show, that plaintiff's assignor had at any time prior or subsequent to the making of the exchange agreement any knowledge whatsoever of the character of the representations made by Chappel when promoting the exchange. This being so, the trial court rightly rejected the evidence referred to.

The judgment and order are affirmed.

---

[Crim. No. 622. First Appellate District.—June 15, 1916.]

THE PEOPLE, Respondent, v. RALPH DAY, Appellant.

**CRIMINAL LAW—BURGLARY—RECEIVING STOLEN GOODS—ELECTION OF PROSECUTION.**—In a criminal prosecution, even if the evidence warranted a charge of burglary upon the theory that the defendant was an accessory thereto, where it also shows that the defendant subsequently received the fruits of the burglary from the actual perpetrator thereof, knowing them to be stolen, as defendant was guilty of receiving stolen goods, he cannot complain that the people elected to charge him with the latter offense rather than with the former.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

B. V. Sargent, and John Rutledge, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**THE COURT.**—We find from a review of the record that the evidence in this case sufficiently supports the verdict; that even if the evidence warranted and would have supported a charge of burglary upon the theory that the defendant was an accessory thereto, nevertheless it also shows that the de-

fendant subsequently received the fruits of the burglary from the actual perpetrator thereof knowing them to be stolen; that as a consequence he was guilty of receiving stolen goods; that therefore he cannot be heard to complain that the people elected to charge him with the latter offense rather than with the former. We further find that the testimony of the admitted accomplice of the defendant in the commission of the crime charged was amply corroborated by other and independent evidence, and that there was no error in the charge of the court or in its refusal to give certain instructions requested upon behalf of the defendant.

Upon these grounds the judgment and order appealed from are affirmed.

---

[Civ. No. 1656. First Appellate District.—June 15, 1916.]

W. H. MacGILLIVRAY, Appellant, v. A. D. OWEN,  
Respondent.

**JUDGMENT BY DEFAULT—ORDER SETTING ASIDE—VERBAL STIPULATION—SUFFICIENCY OF EVIDENCE.**—On a motion to set aside the default of a defendant and vacate a judgment entered thereon, where the trial court found that an oral stipulation had been entered into between the defendant and one of the attorneys for the plaintiff, since deceased, to the effect that it would not be necessary for said defendant to appear in the action and that no judgment would be taken against him, and that for a period of more than six years thereafter, during which time the defendant had made no appearance, relying upon such stipulation, no default was entered and no judgment taken, but after the lapse of said time defendant's default was taken and judgment entered against him, and he immediately after discovering the fact and within a few days after the entry of the judgment made said motion, there was no abuse of discretion on the part of the trial court in granting the motion.

**Id.—VERBAL STIPULATIONS—RULE.**—While it is true that the courts have early and often applied the rule that verbal stipulations as to pleadings and evidence will not ordinarily be regarded and enforced in the courts except when admitted by the parties against whom they are invoked, the courts have been indisposed to give this otherwise general rule application to default judgments, and in such cases they have allowed the trial court a wide discretion in determining whether or not the defendants should not be relieved from such default and allowed to defend upon the merits.

**APPEAL** from an order of the Superior Court of Fresno County vacating a judgment and setting aside a default. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Royle A. Carter, and Thomas F. Lopez, for Appellant.

M. B. Harris, and E. M. Harris, for Respondent.

**THE COURT.**—This is an appeal from an order setting aside the default of the defendant and vacating a judgment entered upon such default.

The grounds of the defendants' motion for such relief consisted of the showing made by him that in the month of March, 1908, shortly after the commencement of the action, an oral stipulation had been entered into between himself and Stanton L. Carter, Esq., one of the attorneys for the plaintiff in the action, to the effect that it would not be necessary for said defendant to appear in the action, and that no judgment would be taken against him, and upon the further showing that for a period of more than six years thereafter, during which the defendant had made no appearance, relying upon such stipulation, no default was entered and no judgment taken against him, but that in the month of September, 1914, the action was dismissed against the other defendants therein, and default and judgment entered against this defendant, which he made this motion to have set aside immediately after his discovery of the fact and within a few days after the entry of the judgment.

Upon the hearing of the motion the affidavit of defendant with certain evidence was offered, strongly tending to prove the existence of such stipulation and of the defendant's reliance thereon. It further appeared that Stanton L. Carter, Esq., had died in the meantime, and hence no affidavit could be presented from him denying the existence of said stipulation. The plaintiff did, however, present some evidence—mostly hearsay—having some tendency toward proving that such an oral stipulation had not been made; but in so far as the defendant's affidavit positively asserted the existence of the stipulation, it was undenied, except upon information and belief.

The trial court found that such stipulation existed, and thereupon set aside the default and judgment taken and entered in contravention thereof.

We find no error in such ruling. While it is true, as the appellant asserts, that the courts of this state have early and often applied the rule that verbal stipulations as to pleadings and evidence will not ordinarily be regarded and enforced in the courts, except when admitted by the parties against whom they are invoked, the courts have been indisposed to give this otherwise general rule application to default judgments (*Johnson v. Sweeney*, 95 Cal. 306, [30 Pac. 540]); and in such cases have allowed to the trial courts a wide discretion in determining whether the defendant should not be relieved from such default and allowed to defend upon the merits. (*Craig v. San Bernardino Inv. Co.*, 101 Cal. 124, [35 Pac. 558]; *Reclamation Dist. v. Hamilton*, 112 Cal. 610, [44 Pac. 1074]; *Durbrow v. Chesley*, 24 Cal. App. 418, [141 Pac. 631]; *Jergins v. Schenck*, 162 Cal. 747, [124 Pac. 426].)

In the case at bar the direct proof of the defendant as to the existence of the oral stipulation is unmet by an equally direct denial of its existence, for the reason, as the appellant contends, than Stanton L. Carter, Esq., with whom it is claimed by the defendant to have been made, is dead. But, on the other hand, it is shown by the record that Mr. Carter lived for several years after the time when the entry of the default might properly have been made and judgment taken against him if such stipulation to the contrary did not exist, and that during the lifetime of Mr. Carter no such steps were taken. Under these circumstances we are of the opinion that the court did not abuse its discretion in setting aside the default and judgment, and in permitting the respondent to defend this case upon the merits.

We see no force in the other points presented by the appellant.

Judgment affirmed.

[Crim. No. 635. First Appellate District.—June 15, 1916.]

**THE PEOPLE, Respondent, v. ROBERT J. WEIR,  
Appellant.**

**CRIMINAL LAW—DRAWING CHECK WITHOUT SUFFICIENT FUNDS ON DEPOSIT—PLEADING AND PROOF.**—In a prosecution under section 476a of the Penal Code for fraudulently drawing a check without sufficient funds or credit with the drawee, it is not essential to a statement of the facts constituting such offense that the information should allege the check was presented to the one on whom it was drawn; nor is it necessary to establish such fact to sustain a conviction.

**ID.—EVIDENCE—CRIMINAL INTENT—SIMILAR ACTS.**—In such a case the criminal intent of the defendant in making and drawing the check is an essential element of the offense, and where he admits the act, but claims that it was free from felonious intent, proof of similar acts, even though they be independent and disconnected, committed either before or after the perpetration of the crime charged, are relevant and competent for the purpose of showing guilty intent.

**APPEAL** from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

R. W. Hays, and B. W. Gearhart, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**THE COURT.**—In charging the commission of the felony defined by section 476a of the Penal Code, it is not essential to a statement of the facts constituting such offense that the information should allege that the check drawn by the person charged with the offense was presented to the bank. Such in effect was the ruling in the case of *People v. Mohr*, 157 Cal. 732, [109 Pac. 476]. It follows logically that if such fact was not required to be pleaded against the defendant, it was not necessary to be established against him in order to secure and sustain his conviction.

The criminal intent of the defendant when making and drawing the check in question was an essential element of the

offense with which he was charged; and he admitting the act but defending in part upon the ground that it was free from felonious intent, proof of the commission of similar acts, even though they be independent and disconnected, and were committed either before or after the perpetration of the crime charged, was relevant and competent for the purpose of showing guilty intent. (*People v. King*, 23 Cal. App. 259, [137 Pac. 776].)

The evidence upon the whole sustains the verdict and judgment. The judgment and order denying a new trial are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 14, 1916.

---

[Crim. No. 359. Third Appellate District.—June 15, 1916.]

In the Matter of the Application of JOHN JUNE for a Writ of Habeas Corpus.

CRIMINAL LAW—ORDER SUSTAINING DEMURRER TO INFORMATION—DIRECTION FOR NEW INFORMATION—SECTION 1008, PENAL CODE.—In a prosecution for obtaining money under false pretenses, where the court sustained a demurrer to the information, and made an order directing "that the district attorney may file a new information on the proceedings heretofore had, or any other proceedings that the district attorney may elect, as prescribed by section 1008 of the Penal Code," the order was a direction by the court to proceed further under section 1008 of the Penal Code, and the discretion given the district attorney, if any, was merely to make an election as to which one of the courses pointed out in the section he should take, and he was authorized to proceed under the order to procure an indictment of the defendant for the offense charged in the information.

APPLICATION originally made to the District Court of Appeal for the Third Appellate District for a Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

**R. L. Thompson, and Phil Ware, for Appellant.**

**G. W. Hoyle, Assistant District Attorney, for Respondent.**

CHIPMAN, P. J.—Petitioner was informed against by the district attorney of Sonoma County for the crime of obtaining money under false pretenses. Upon demurrer to the information the court made the following order, January 10, 1916: "This cause came on regularly for the defendant to plead. The district attorney and Phil Ware and R. L. Thompson, Esq., being present, it being agreed that defendant was present; Whereupon it is ordered by the court that the demurrer filed herein be and the same is hereby sustained, and the court directs that the district attorney may file a new information on the proceedings heretofore had, or any other proceedings that the district attorney may elect, as prescribed by section 1008 of the Penal Code."

Pursuant to said order the district attorney procured the indictment of petitioner by the grand jury for the same offense as that charged in the information, and petitioner was thereupon arrested upon a bench warrant and taken into custody by the sheriff, and is now held in imprisonment thereunder.

Petitioner seeks his discharge by writ of *habeas corpus* on the ground that said order was insufficient to justify the district attorney to proceed further in the action, for the reason that said order left the matter wholly in his discretion, whereas section 1008 of the Penal Code requires, as has frequently been held by the supreme court and the district courts of appeal, that such order should be mandatory, leaving no discretion whatever with the district attorney.

We think the order in question, fairly construed, was sufficient authority to justify the further proceedings taken by the district attorney.

The court filed an opinion, on January 10, 1916, giving its reasons for sustaining the demurrer. The concluding paragraph reads: "The court will sustain the demurrer to the information. I will make an order provided by section 1008 of the Penal Code. If the district attorney desires to amend it, he may, or take such other course as he may be advised. The court directs that a new information be filed in this case upon the examination already had, if the district attorney

desires, or the defendant may be re-examined by a magistrate or the matter may be submitted to a grand jury, or such course as the district attorney may elect to take, as provided by section 1008 of the Penal Code of this state."

As we understand the record, the order entered was that first above quoted. But whether that be treated as the order in the case or the statement made in the opinion be the order, we still think that the district attorney was directed by the court to proceed further under section 1008 of the Penal Code, and the discretion given him, if any, was merely to make an election as to which one of the courses pointed out in the section he should take.

The writ is discharged and the prisoner remanded to the custody of the sheriff.

Hart, J., concurred.

---

[Civ. No. 1873. First Appellate District.—June 16, 1916.]

W. P. ROBINSON, Respondent, v. FRANK OTIS, as Mayor of the City of Alameda, et al., Appellants.

**MUNICIPALITIES—CONTROL OF STREETS—PERMITS FOR MOVING BUILDINGS—VALIDITY OF ORDINANCE.**—The city of Alameda by its charter is given authority as a municipal corporation to "manage and control the streets, roads and highways, and to permit, regulate or prohibit the placing of obstructions thereon, and to ordain, make and enforce within the limits of the city all necessary police, sanitary and other laws and regulations (Stats. 1906-7, p. 1059; Const., art. XI, sec. 2)"; and under this grant of power the city has the right to pass an ordinance providing for the issuance of a permit to move a building over the streets of the city upon written application showing the consent of certain property owners, the filing of a bond, and the character of building to be removed, and prohibiting such removal in the absence of the required permission.

**ID.—DISCRETION IN GRANTING OR REFUSING PERMIT.**—The governing body of a municipality has a certain discretion in the granting or refusing of a permit for the moving of a building over the streets, and its conclusion on the subject, in the absence of fraud or circumstances disclosing a manifest abuse of such discretion, is conclusive and not open to question by the courts.

80 Cal. App.—49

APPEAL from a judgment of the Superior Court of Alameda County. William H. Donahue, Judge.

The facts are stated in the opinion of the court.

A. F. St. Sure, for Appellants.

J. A. Elston, and George Clark, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment awarding a writ of mandate. The respondent herein petitioned the superior court of the county of Alameda for a writ of *mandamus* commanding the mayor and members of the council of said city of Alameda to issue a permit to him to move a certain building over the streets of the city. The petition shows that there exists an ordinance of the city of Alameda regulating the moving of buildings upon its streets, which in substance provides for the issuance of a permit upon written application showing the consent of certain property owners, the filing of a bond, and the character of building to be removed, and prohibits such removal in the absence of the required permission. The plaintiff made application, and the matter came on for hearing in regular session of the council; and after receiving evidence for and against the issuance of the permit, the council denied the application, whereupon plaintiff filed his petition for the writ aforesaid. Defendants demurred to the petition, and upon the overruling of such demurrer declined to answer, whereupon judgment was entered against them, awarding to the plaintiff the writ of *mandamus* as prayed for. From this judgment the defendants appeal.

The only questions involved in the appeal are, whether or not the council had the power to enact the ordinance in question, and if, having such power, its refusal to issue a permit was such an abuse of discretion as to warrant the granting of the relief here sought.

The city of Alameda by its charter is given authority as a municipal corporation to "manage and control the streets, roads and highways, and to permit, regulate or prohibit the placing of obstructions thereon, and to ordain, make and enforce within the limits of the city all necessary police, sanitary and other laws and regulations." (Stats. 1907, p. 1059; Const., art. XI, sec. 11.) Under this grant of power there

can be no question but that the city has the right to pass an ordinance of the character mentioned. The authority of municipalities to enact ordinances under its police power has received consideration in a great many cases in numerous jurisdictions. It would be a useless task to review those authorities, and a mere reference to a case where the power was exercised under facts similar to those here will be sufficient. In *Eureka City v. Wilson*, 15 Utah, 53, [48 Pac. 41], an ordinance required the issuance of a permit for the removal of buildings, and it was held that the city council could prohibit by ordinance the moving of a building into and upon the streets of a municipality without first obtaining a permit, and that such right comes within the police power of the state. This case was affirmed by the supreme court of the United States. (*Wilson v. Eureka City*, 173 U. S. 32, [43 L. Ed. 603, 19 Sup. Ct. Rep. 317].)

Having the power to pass the ordinance, it only remains to be determined whether or not the permit in this instance was rightfully refused. A certain discretion in matters of this character must necessarily be vested in the governing body of a municipality; and its conclusion on the subject, in the absence of fraud or circumstances disclosing a manifest abuse of such discretion, is conclusive and not open to question by the courts. (*Vanderhurst v. Tholcke*, 113 Cal. 147, [35 L. R. A. 267, 45 Pac. 266].) No such abuse of discretion is here shown. The council had a public hearing, and having considered the evidence denied the application; and it cannot be said that it arbitrarily or dishonestly exercised its power. On the contrary, there is nothing contained in the record to show but that it acted with good motives and in the interests of the public welfare.

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 15, 1916.

[Civ. No. 1563. Third Appellate District.—June 17, 1916.]

**HERMAN ALBERS, Petitioner, v. SUPERIOR COURT OF  
THE COUNTY OF HUMBOLDT et al., Respondents.**

**JUSTICE'S COURT APPEAL—AFFIRMANCE OF JUDGMENT BY SUPERIOR COURT—REVIEW OF JUDGMENT OF JUSTICE'S COURT IN DISTRICT COURT OF APPEAL.**—A judgment of a justice's court cannot be reviewed on *certiorari* in the district court of appeal, where an appeal has been taken from such judgment to the superior court and the judgment affirmed.

**ID.—APPEALS IN CRIMINAL ACTIONS—JURISDICTION OF SUPERIOR COURTS—GROUNDS OF IMPEACHMENT.**—In view of the fact that the law authorizes appeals to the superior courts in criminal cases of which the justices' and police courts are by law invested with jurisdiction, the only ground upon which the jurisdiction of the superior court may legally be impeached and denied in any such case is either that the case is one of which the justices' courts have no jurisdiction, and in which, therefore, they have no power or authority to enter a valid or any judgment, or that the justice's court, while having jurisdiction of the offense, in some way acted beyond its jurisdiction in entering its judgment, or that the superior court had failed to acquire jurisdiction of the appeal because, in taking the appeal or attempting to do so, there had been a failure to observe some vital and necessary rule of practice or procedure in the matter of taking appeals to such courts.

**ID.—AMENDMENT OF COMPLAINT—ADDITION OF SECOND COUNT—PROCEEDINGS IN JUSTICE'S COURT—JURISDICTION OF APPEAL.**—The superior court is not without jurisdiction to hear and determine an appeal taken from a judgment of a justice's court convicting a defendant of violating the state law making it a misdemeanor to drive an automobile over a highway in excess of the speed prescribed by law, by reason of the fact that the justice's court improperly allowed the dismissal of two complaints for the purpose of amending the same, and that the complaint upon which the defendant was convicted was faulty, because it stated the offense in two separate and distinct counts.

**ID.—FAILURE TO BRING ACTION TO TRIAL WITHIN SIXTY DAYS—JURISDICTION OF JUSTICES' COURTS—CONSTRUCTION OF CODE.**—Jurisdiction of a justice's court of such an offense is not lost by reason of the failure to bring the case to trial within sixty days after the filing of the original complaint, as section 1382 of the Penal Code, providing for the dismissal of criminal actions not brought to trial within sixty days after the filing of the indictment or information, has no application to the trial of low-grade misdemeanors cognizable in justices' and police courts.

**APPLICATION** for a Writ of Certiorari originally made to the District Court of Appeal for the Third Appellate District.

The facts are stated in the opinion of the court.

Pierce H. Ryan, for Petitioner.

J. Charles Jones, for Respondents.

**HART, J.**—This is an original application for a writ of *certiorari*, and the question here is whether the petition herein states facts sufficient to warrant this court in making an order requiring the above-named respondents to certify to this court their respective records in the case of the *People v. Albers* (the petitioner), and thus show cause why the judgment of conviction of the petitioner of a misdemeanor rendered by the above-named justice's court and the judgment rendered by the above-named superior court on appeal in said cause, affirming the judgment of the said justice's court therein, should not be vacated, set aside, and annulled.

The petition shows that petitioner was, on October 21, 1915, charged in the justice's court of Union township, Humboldt County, with violating the state law making it a misdemeanor to drive an automobile over a highway in said county in excess of the speed prescribed by said law; that on the eighteenth day of November, 1915, and after the defendant had entered a plea of not guilty to the charge, the district attorney moved to dismiss the action for the purpose of amending the complaint (Pen. Code, sec. 1387), and, on the same day, filed a new complaint, purporting to charge the same offense; that on February 26, 1916, the petitioner was tried on the complaint as so amended before a jury, that the jury disagreed and were discharged without arriving at a verdict; that on the seventh day of March, 1916, the action was again dismissed on the motion of the district attorney for the purpose of further amendment of the complaint, and on the same day a new complaint was filed charging the petitioner with precisely the same offense as that charged in the two complaints previously filed and dismissed.

The complaint last filed and upon which the petitioner was tried, convicted, and sentenced charged the offense in two

separate counts, each being precisely in the same language, as follows: "... That said Herman Albers, on the 21st day of October, 1915, at and in the said county of Humboldt, ... did then and there willfully and unlawfully drive and operate a motor vehicle, to wit: an automobile, at a rate of speed in excess of thirty miles an hour upon a public highway in said county," etc.

The petitioner moved to strike out the second count, which was introduced into the complaint with the language: "And for a further, separate and second count, affiant alleges," etc. The motion was denied and the petitioner then objected to the court proceeding with the trial of the case, and moved to dismiss the same on the ground that the action had not been brought to trial within sixty days after the filing of the first complaint, nor within sixty days after the filing of the second or first amended complaint. The objection and the motion were overruled and the petitioner thereupon entered a plea of not guilty and also a plea of once in jeopardy. The jury found the petitioner guilty under the second count of the complaint, but made no finding upon the plea of jeopardy and none as to the first count.

The petitioner, after verdict, moved the justice's court for a new trial, the motion was denied, and judgment thereupon rendered that he pay a fine of \$75, and that in default of the payment of said fine he be imprisoned in the county jail for one day for each dollar of so much of said fine as might remain unpaid, and that he be imprisoned in the county jail for the period of twenty-five days. The petitioner then appealed to the superior court from said judgment upon questions of law alone, and said court modified the same by striking therefrom so much thereof as would have required the petitioner to suffer imprisonment in default of the payment of the fine of \$75, and, as so modified, the judgment was affirmed and the appeal dismissed.

The points made in support of the application for the writ are: 1. That the justice's court exceeded its jurisdiction in permitting the district attorney to add a second count to the complaint and that, therefore, the conviction and the judgment "had and entered on such added count are clearly void"; 2. That, the petitioner having interposed a plea of "once in jeopardy," it was the duty of the jury to make a direct and specific finding on said plea, and their failure to

do so rendered their verdict and the judgment thereupon entered absolutely void; 3. That the complaint last filed did not in fact or in law constitute an amendment, but amounted in both substance and form to an entirely new complaint. And it is further declared, though the point does not appear to be pressed, that the justice's court exceeded its jurisdiction in the imposition of a penalty, in that when said court imposed a fine of \$75 with the alternative of one day's imprisonment for each dollar of the fine, it exhausted its jurisdiction, and, therefore, had no jurisdiction to impose an additional punishment.

It is first to be remarked that, since the whole "controversy here presented for review was presented to the superior court, and by the judgment of that court of general jurisdiction was determined adversely to the petitioner's contention," the judgment of the latter court operates as an estoppel, and the matter so adjudicated becomes *res adjudicata*, "with all the binding force and effect by way of estoppel which attaches to every such judgment. . . . So long as the judgment of the superior court stands unassailed, that judgment formally decreeing the validity of the judgment of the justice's court cannot be ignored nor in another proceeding swept aside. The appeal from the judgment of the justice's court, heard and determined by the superior court, was in all respects the equivalent of a writ of error, and the application to this court for *certiorari* is but an attempt to obtain a second writ of error directed, not against the appellate judgment, but against the judgment of the justice's court upon matters adjudicated by a court of general jurisdiction under the first appeal or writ of error. It is well settled that this cannot be done." (*Olcese v. Justice's Court*, 156 Cal. 82, 86, [103 Pac. 317]; see, also, *Hayes v. Collins*, 114 Mass. 54; *State v. Water Commissioners*, 30 N. J. L. 247; *Illingworth v. Rich*, 58 N. J. L. 507, [34 Atl. 757].) It follows that the writ here applied for cannot be granted for the purpose of reviewing the judgment of the justice's court.

The remaining question, then, is whether the respondent, superior court, was without jurisdiction to review and enter a judgment on appeal in this case.

It is manifest that, since the law authorizes appeals to the superior courts in criminal cases of which the justices' and police courts are by law invested with jurisdiction (Pen.

Code, sec. 1466), the only ground upon which the jurisdiction of the superior court may legally be impeached and denied in any such case is either that the case is one of which the justices' courts have no jurisdiction, and in which, therefore, they have no power or authority to enter a valid or any judgment, or that the justice's court, while having jurisdiction of the offense, in some way acted beyond its jurisdiction in entering its judgment, or that the superior court had failed to acquire jurisdiction of the appeal because, in taking the appeal or attempting to do so, there had been a failure to observe some vital and necessary rule of practice or procedure in the matter of taking appeals to such courts. In this case there is no claim that jurisdiction was not acquired by reason of the omission to observe or follow in a material respect the procedure prescribed for taking appeals to the superior courts; but the whole theory is that in no event did or could the superior court have jurisdiction to hear and determine the appeal, because the justice's court in the first instance was wholly without jurisdiction of the action for the reasons above stated, and was, therefore, without authority to render the judgment which was reviewed and affirmed by the superior court.

That the sole office of the writ applied for here is to test the question of jurisdiction, is well understood. And the jurisdiction of the justice's court of the offense of which the petitioner was convicted will not and, indeed, cannot be questioned (sec. 32, act regulating motor vehicles, Stats. 1915, p. 413); and it is equally clear that said court acquired jurisdiction of the action, even though the complaint might not be what it ought to be as a criminal pleading.

Conceding that the justice's court improperly allowed the motions of the district attorney to dismiss the first and second complaints filed for the purpose of amending the same, and conceding that the last complaint filed and upon which the petitioner was tried, convicted, and sentenced was faulty, because it stated the offense of which the petitioner was convicted in two separate and distinct counts, and that the court erred in not granting the petitioner's motion to strike out one of the counts, still none of these matters affected the question of jurisdiction or divested the justice's court of jurisdiction of the action. They involved or amounted to mere error, reviewable and correctible only by appeal. It cannot, of

course, be doubted that, notwithstanding the alleged duplicity of the complaint, it nevertheless stated a public offense known to the law of this state; nor is there any possible logical ground for holding that, merely because a criminal pleading is amenable to the charge of duplicity, the jurisdiction of the court of the action is ousted. The law provides a remedy for the correction of the defects of a complaint or an information or an indictment, and where the court fails or refuses to heed the objections and so to correct the defects, the action of the court in that regard is error, correctible, as before stated, not through the instrumentality of a jurisdictional writ, but by review on appeal.

What is thus said applies with equal force and pertinency to the point that the jury failed to find upon the special plea of "once in jeopardy" interposed by the petitioner.

As to the point that the justice's court lost jurisdiction of the action because there was a failure to bring the case to trial within sixty days after the filing of the first or original complaint or after the filing of the purported first amended complaint, a reply thereto is that section 1382 of the Penal Code, upon the terms of which the petitioner bases his claim in that particular, is applicable alone to criminal cases prosecuted by indictment or information, and has no reference to the trial of low-grade misdemeanor cases cognizable in justices' and police courts.

It thus being shown that the justice's court had the authority to render judgment against the petitioner in the action before it, there is, obviously, no ground upon which it can be maintained that the respondent, superior court, was without jurisdiction to review said judgment on appeal.

The application for the alternative writ is, accordingly, denied.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.

[Civ. No. 1515. Third Appellate District.—June 19, 1916.]

**JOHN A. SOULE, Respondent, v. LOTTIE M. WYATT et al., Appellants.**

**ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.**—In this action to have set aside and declared void a deed made by an aged father of all his property to one of his daughters to the exclusion of his other children, on the ground that the execution of the deed was procured through the frauds and misrepresentations of such daughter, and by the undue influence exerted by her upon him at a time when he was enfeebled in mind and health and incompetent to make a deed or dispose of his property, it is held that the findings that the allegations of the complaint were true are supported by the evidence.

**APPEAL** from a judgment of the Superior Court of Yolo County. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

E. S. Bell, for Appellants.

W. A. Anderson, George Clark, and Black & Clark, for Respondent.

**CHIPMAN, P. J.**—Plaintiff commenced the action to set aside and have declared void a certain deed conveying to his daughter, Lottie M. Wyatt, one of the defendants, certain real property situated in the town of Washington, Yolo County, on the ground that "said deed was procured to be executed by the said defendants through the frauds and misrepresentations of said defendants, and by the undue influence exerted by the said defendants upon the said plaintiff at a time when he was enfeebled in mind and health and incompetent to make a deed or to dispose of his property," and that "plaintiff's title to said property be quieted against said defendants and each of them." The cause was tried by the court and plaintiff had judgment in his favor, from which defendants appeal.

The court made the following findings of fact: "1. The court finds all and singular the allegations of the plaintiff's complaint to be true. 2. That the attorney who prepared

the deed for the signature of the plaintiff was in no manner a party to the plan under which the said defendants procured the making of said deed, and the said attorney acted wholly without knowledge of the manner in which defendants did procure the making of the said deed by the said plaintiff."

Plaintiff was a pensioner of the Southern Pacific Company in 1911, residing on the premises in question in the town of Washington, sometimes called Broderick. His family consisted of his wife and grandchild, Flossie Conrad, daughter of defendant Lottie Wyatt by her first husband. When Flossie was an infant she was taken into plaintiff's family and reared as their own child. Plaintiff was seventy-seven years old and was suffering grievously with a painful disease of the eyes, and finally lost the sight of one of them. He was feeble from the infirmities of age and was afflicted with heart trouble, which at unexpected moments would cause him to lose consciousness and fall to the ground as in a fit, lying there rigid "and as though dead," as one witness described his condition. On July 13, 1911, his wife died and Flossie's mother took Flossie away to her own home at Rutherford, Napa County, and plaintiff went to the home of his son, Charles C. Soule, in Broderick. The loss of his wife, the taking from him his grandchild, Flossie, to whom he was devotedly attached, together with the excruciating pain caused by the disease of his eyes and his general weak physical condition, so affected plaintiff as to make him an object of pity and commiseration. He was ill for some time after the death of his wife. He testified: "I lost my eyesight, then worrying about my wife and my baby [he called Flossie "his baby"] that I thought a good deal of took away from me, and all things together made me sick, that is about all I can remember at the present. . . . Q. What effect, if any, on your feelings or your mind did the death of your wife and the breaking up of your family have? A. Well, it made me what you might say crazy; in fact, I think I am so yet." He visited his daughter, Mrs. Wyatt, occasionally for some time after his wife's death. "Q. What took you down there, what was the cause of your going? A. Well, in the first place I didn't want to go down; I rather be at my old home, it is natural, but they took my baby away and caused me to go down there, my daughter did, thought if I would come down there I would be better off where Flossie was, and so I made up my mind

I would go down there; I like to be where she was, so I went down and stayed there a while and came back awhile and kept going."

The deed in question was executed on July 30, 1912, three weeks after he went to Rutherford to live with defendants. He testified as to his then physical condition as follows: "I was pretty sick; I was weakened down, discouraged, my eyesight was failing, and I felt weak; one-half of the time I couldn't rest nights; they gave me whisky with some stuff in it to make me sleep, one thing and another, so, therefore, I got pretty weak for quite a while, but I got better." Several witnesses testified to his weakened condition; that his eyes gave him great pain; that he was subject to fainting spells from heart trouble; that he constantly grieved, "and was brooding" over the loss of his wife and having his granddaughter taken from him. Besides defendant, Mrs. Wyatt, his children were Mrs. Annie Lindsay and two sons, Charles C. and John G. Plaintiff testified that after he came to Rutherford, and before the deed was made, defendant Mrs. Wyatt told him she learned through two letters written to Mrs. Addie Barry, residing at Rutherford, sister to plaintiff's deceased wife, that his son John and Mrs. Lindsay were going to get all his property. "She [Mrs. Wyatt] said they were going to have it all, them two, and I remarked I didn't want them to have it all. I wanted to divide it amongst the four of them."

Mrs. Barry testified that this representation by Mrs. Wyatt was false and that Mrs. Lindsay had not written any such letter. Plaintiff testified: "Q. What did she keep saying to you? A. She say they made their brags they were going to have it all because they done the most work on it. I admitted they did, but at the same time I didn't think it was right for them to have it all. Q. What did you say on the subject of dividing your property? A. I say I wanted to divide it, want it equally divided. Q. What way? A. Each one of them to have their share. Q. Where and when did you tell her that? A. Well, about the time we were talking about it; I don't know exactly when it was. Q. But it was before the deed was made? A. It was before the deed was made. Q. Was anything said by her when you stated you wanted to divide it up among them all? A. Well, she said I couldn't do it, because they were going to have it all, Annie

and John was; of course, I couldn't divide it if them two going to get it all, and I didn't like that idea. Q. Was anything said about a will? A. Yes, sir; I did. Q. What did you say? A. I said, 'Well, then I will fool them; I will make a will, then they can't get any more than the others'; and she said, 'A will can be broke.' Q. Where was her husband during the talk? A. One time we were talking about it, I couldn't say at the dinner-table or supper-table, talking about the will, and she turned around and says to Harry—we call him Harry—'A will can be broke, can't it?' and he says, 'Yes.' That finished it for that evening. Q. At that time you were living down there? A. At that time I was living down there. Q. That was before the deed was made? A. That was before the deed was made. Q. At the time of that talk about saying a will could be broke, was anything said about a deed? A. Yes. Q. Who said it? A. She said a deed—no, he said a deed would be the best, because can't break a deed. Q. What did she say, if anything? A. I don't remember she said anything, in reply to that or not at that time, but talked about it afterward, but not at that time. . . . Q. After these talks you have referred to was there any further talk between you and them regarding your property and disposing of it in any way? A. Why, about making the deed? Q. Yes. A. Well, she said—I said, 'Well, if a will can be broke, I would like to have Charlie and you and Flossie have a share of it, because if the rest want it all that looks kind of hoggish to me; they so mean probably they won't get any of it.' So she says, 'Well, you can't mention Flossie because what belongs to me belongs to Flossie.' 'Then I will make it in your and Charles' name.' 'Well, you can't make it in two names; have to make it in one; make it in my name, then I can give Charlie his share.' 'What is his share?' 'Well, I will give him a thousand dollars.' 'Well, he ought to have more than that.' 'Well, but I have to take care of you.' 'Take care of me? I don't want any care. I will go to the county hospital if the worst comes to the worst.' Q. You stated she said something about making out a deed in more than one name? A. She said you couldn't make it in more than one name. Q. Did you believe those statements? A. I believe it; yes, sir; I didn't know any better. Q. How long before you went up to Mr. Bell's office was it this talk occurred that you mentioned? A. How long before?

Q. Yes. A. It might have been—well—I will say about three weeks; I don't know if it was quite as much as that, but say three weeks; I can't remember these things right up to a date. Q. How often was the matter of deeding your property talked over? A. Oh, every little while get to talking about it until at last I got tired; I say I never had anything; in fact, I ain't got nothing; I couldn't handle it to suit myself; I was getting tired and sick hearing them talk about it. Q. When the talk occurred or the talks occurred about the making of a deed, was there anything said regarding disposing of the property after the deed was made? A. Yes. Q. What was said? A. She says, 'Papa, you make it in my name; you know you are pretty sharp on a bargain and you can sell it any time you like, and all I have got to do is sign the papers,' so, of course, I thought I could have that privilege. Q. How long before you actually signed the deed did she make that statement to you? A. How long before? Q. Yes, the first time she made that statement to you. A. Well, I don't remember that, I would like to tell it as near as I can remember. Q. But you know it was before the deed—you know it was before the deed was made? A. Yes, it was before the deed was made, then after the deed was made, Mr. Joe Harbinson, a wholesale liquor man in Sacramento, wrote me a letter—of course, I can't read—he would have given me two thousand five hundred dollars cash for my property, and I laughed about it, and I said, 'Flossie'—or at least 'Lottie'—I got Flossie on the brain, no wonder—'Lottie, write a few lines to Mr. Harbinson and I will tell him what I will take for the property,' and she jumped up and she commenced cussing and swearing, 'To hell with him! I don't want to sell it, I don't want to sell it.' Says I, 'If he gives me what I ask for it, isn't that satisfactory?' 'No, I won't sell it.' I says, 'Write a few lines anyhow.' 'No.' Wouldn't do it. . . . Q. When this statement was made to you about making the deed to one person only did you make any statement to your daughter about the fact that you might want to sell this property? A. Yes. Q. What did you say to her in regard to that matter? A. I told her I would like to sell it; she said I could sell it any time I liked because I was pretty sharp on a bargain. Q. I will ask leave to ask this question though it is leading. Did you say to her, 'I said I didn't like to deed it because then I can't sell it?' A. Yes, sir; that

is what I am coming at, and she said, yes, I could. Q. She stated yes, you could? A. Yes. Q. Did you believe that statement she made to you? A. Well, I never dealt much with buying and selling, of course. Q. What I mean is this: did you rely on the statement she made to you? A. Certainly. Q. Believed it? A. Certainly; I thought she meant what she said at the time; if I didn't I wouldn't have done it. Q. Was the getting of an attorney to fix up the deed mentioned? A. She says she get Mr. Bell; he was a good hand to do anything like that because he done all the work for her husband when his mother died, and he understood it thoroughly, so Mr. Bell did do it. Q. Did you still believe and rely on those statements when you signed that deed? A. Yes, sir; I believed what she told me; I believed she thought she was telling what she meant."

Mrs. Soule, wife of Charles, with whom plaintiff lived after the death of his wife, testified: "Q. Do you know whether while the old gentleman was living there in the town of Washington he was worried or grieved? A. He grieved all the time; every minute of his life he grieved from the time he would get up, over his wife's death, and being left without his baby, as he called Flossie." She testified to his being kept in a dark room on account of his eyes—"he was suffering terrible day and night, got up at all hours of the night; that was just before he went to Rutherford. . . . Q. Did anyone coming from Rutherford make any requests that he go down there? A. Yes; Flossie came for him, begged him to go down to mother, when he was sick, begged him, says, 'Mam told me to tell you to come, come down to her, that is the place'; he said, 'No, I don't want to go, I want to stay here,' nobody could take care of him like Madge; he imagined I could take care of his eyes because I had been doing it, I guess. Q. Did you have any talk with Lottie M. Wyatt about the time of his going down there? A. Oh, yes, she would talk—the time when she came to get him after he went down for the short visit then she came up to take his things down. Q. Did you have any talk with her, particularly with reference to any dealings she might have with him, what she might accomplish with him? A. She was talking to me, she said, 'They think they are going to get it all, but wait until I get him down there, you bet I'll get it.' Q. When was it she said that to you? A. When they were taking the furniture,

the day before. Q. Did she ever say anything to you about any particularly scientific way of handling the old gentleman? A. No, only just when the other daughter was talking to him, they were fussing, she said, 'You can't ruffle his feathers; you have to smooth him down the right way and you can do anything you want with him.' Q. She said that to you? A. Yes. Q. In the town of Washington? A. Yes. Q. Before he went down there to live? A. Yes, when he was getting ready to go. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way in which he wanted to leave his property? A. It seemed like that was on his mind all the time, yes; he wanted share and share alike, 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes, she wrote about every day when he was so bad, begged him to come down."

On cross-examination she testified: "Q. Didn't you tell anyone she had told you this? A. No, they all seemed—I wasn't interested in it, it was nothing to me; they never took me much into their affairs; she was talking to me in bed; she wanted to know if father would give Charlie anything—'what do you think he would do with it?' I says, 'I don't know.' She says, 'I bet if he did give him anything he would blow it in.' I says, 'I don't know.' She says, 'I'll tell you what I think he would do, he would take a long trip.' Q. She said if she got him down to Rutherford she would have it all? A. She was speaking of the other two; she said they wanted it, the other two, the daughter and son, they wanted it because they helped make it—'If he lives a week after I get him, I'll see they don't get it.'"

A letter written by defendant Mrs. Wyatt was identified by the witness. This letter was addressed to "Charles C. Soule, Broderick, Yolo Co., Cal.," also postmarked Broderick. It was dated three days after the deed in question was executed and was as follows:

"burn this.

Rutherford, Aug. 2, 1912.

"Dear Brother: I just received you most welcome letter. We are always glad to hear from you. Pa seems to think he ought to hear from you every day now we are all fine and hope you are all the same well we are not surprised to know that she comes every day but Charley you don't have to put up with that you can do just as you like in that house and

make her stay away and I would do so to I would not let her come there and worry Mady so I know she must get tired hearing her tongue run and she has got so she lies pretty good to now, Charley don't do anything to give her a chance to get you in any trouble you know she would only be to glad to see you in trouble and I guess that is what she is trying to do she said all she could to get me started but I was to smart for her she tells everybody I am crazy but she will soon think I am about as smart as she is when she finds how things are now Charley I don't want you to worry you will get what belongs to you some day we went to Napa Tuesday and the deeds are made so it is you and I for it we got one they cant brake to the only way they could is to prove he was not in his right mind when he did it now that Pa is a resident of Napa Co all they could do would have to be done here and they can never prove that he aint in his right mind Papa says he don't want you to worry about anything he say you are his and you shall have what is yours say he wants you to bring him the two canes they stand in his room up stairs and the hook Polly had to hang his cage on so don't forget it he talks about them so much now I guess she wants to make trouble between Madge and I but if Madge listens to her she will have plenty to do she can lie pretty good well I have got the flower picture ready to send to John Pa changed his mind about keeping it so I will send it to him Annie will get left if she thinks the things I brought will ever be sent back I guess you will hear her all over town when she sees the deeds published in the Woodland paper I guess Mrs. Snider takes it they will say to you yes Lott got it and you will get left but Charley dont believe all you hear I want you to know you have one who will do right by you and I must say Madge treated me very nice and Pa says he will never forget how good she was to him he eats good and sleeps good and seems to be so happy we do all we can to please him and we always will he is a good old father he had beans for breakfast this morning well I will go to bed it is late and I am tired now write soon love to all dont get in trouble with that devil

“your loving sisted

“LOTTIE.

“When you hear about the deeds just say Lot said she thought she would bye it as it was her old home.”

A fragment of another letter written by defendant Mrs. Wyatt to Charles Soule read:

"he thinks he will come home sunday I sent the picture to him so his Polly can have it to look at I fixed Pa room up and it looks fine he eats good and sleeps good well Kid I don't know what could be rong with my last letter you say you don't understand it I told you he deeded it to me at least I intended to tell you so I know you must feel lonesome at time not seeing mother or father there but Father can go there to see you but our dear old mother we must give up we cant have her any more in this life I would not be surprised to see John and Annie try to brake the deeds but they will have a hard time doing it they would have to prove Pa was not in his right mind when he did it that would have to be done here so I am not afraid of it now if you dont come sunday why write and tell us the news love to you both

"Your loveing sister

"LOTTIE."

It appeared that plaintiff went to Napa with Flossie on July 3d and returned with her mother after the 4th, when they packed the furniture and returned shortly afterward to Rutherford. The deed, as we have seen, was executed on July 30th. As to the circumstances attending the execution of the deed plaintiff testified: "Q. Who accompanied you to Mr. Bell's office when you went there, who went with you? A. Her husband, Harry Wyatt. Q. How did you get up the steps? A. She and him went together, he took me by the arm, helped me upstairs and downstairs through a hall; that is all I can remember about it. Q. At this time did you have anything over your eyes? A. Yes, sir. Q. What? A. I had my specs, I had a shade, and I had the rim of my hat over my eyes because the light bothered me a good deal. I got the same shade now at home. Q. Tell us as near as you can remember what occurred in Mr. Bell's office. A. Well, as near as I can remember, come there, says I come there to make a deed out, deed my property over to my daughter; of course, Mr. Bell knowed it; it was all understood beforehand, him being there, talked about it, had to go get Mr. Bell ready to attend to business. Mr. Bell: I move to strike out what Mr. Bell knew. Mr. Clark: We consent. The Court: Stricken out. Mr. Clark: Q. Was the deed made out when you got there or made out afterward, do you know? A. Made right

away, right there while we were there. Q. Do you remember whether it was read over to you? A. Read over to me! Q. Yes. A. No, sir, I don't remember any such thing. I didn't know it was sold for \$10; that was never mentioned to me. If they did I think I would have kicked, I would have thought there was something kind of funny. Q. Did you sign your own name? A. Yes; I signed it myself; I made a cross with a pen. Q. What was done with the deed afterward? A. Well, as near as I can remember, I think Mr. Bell kept it and sent it to Woodland to get it recorded; I think that is about the way it went. Q. Did you know it was going to be recorded at the time? A. I know it was going to be recorded; yes, sir." He testified further: "Q. What was the manner of their treatment toward you, Mr. Soule, before you made this deed, the family, what way were you treated in the Wyatt family before you made this deed? A. The reason I didn't what? Q. What was the manner of their conduct toward you before you made this deed; how did they treat you when you were down there? A. They treat me very kind; they couldn't do enough for me; treat me very kind, very kind indeed; I felt so sick I was like a child; you take a child, if he sick you pet it, make over it; that is just what he likes; that is just like me. Q. How far was the little room you slept in from the house? A. The room I slept in joined the saloon; I should judge about fifteen feet from the house, about that. Q. How was it about calling you to your meals, before the deed was made? A. The bell would ring; I didn't very often hear the bell; I am a little hard of hearing, but they tell me; we go along like two good friends, so with us; open the screen door, open the other door, I go in ahead of him, he come in behind, shut it, sit down at the table, he wait on me, everything I had nice. Q. How was their treatment of you after the deed was made? A. Well, I commenced thinking that things didn't go quite so sociable, didn't look exactly right—'Did you hear the bell?' 'No, I didn't hear it.' 'Well, dinner ready. Ain't you going?' 'I be there pretty soon.' Sometime he go when I did, sometime he didn't. When I got in the house his wife waited on me; I see he knocked off waiting on me; I thought it kind of funny; I thought all that but said nothing, but I noticed it. I was getting quite smart at that time, wasn't quite so sick; I was noticing things a little mite more. Q. How did you spend your time over

there? A. Sitting in front of the saloon. I was figurehead for the saloon; had nowhere else to stay unless I stay in the house. Q. The saloon was a short distance from the house? A. Saloon just about—the front door of the saloon and the front door of the house was about sixty or seventy feet off, say sixty or seventy feet from the saloon door. Q. Mr. Wyatt was running this saloon there? A. Mr. Wyatt was running this saloon there. Q. Your room was built on to the saloon? A. My room was built on to the saloon; one door open into the saloon, and one door open out in the back yard, one door open out in the street—three doors to the room. Q. Before the deed was made would they read to you? A. Well, I used to buy a paper called the 'Yolo Independent'; I didn't buy it for me, bought it for my granddaughter; she wanted to hear the news from home where she was brought up and so on, but I wanted to hear the news, and they took the 'Bee' and they used to read the news right away as soon as they would get it, and I was anxious to have it read, but somehow or other afterward, they were not so anxious to read it to me—'I ain't got time now, Pa.' 'I seen so and so happened in Washington.' 'Where did you see that?' 'I saw it in the paper.' 'Why didn't you read it to me last night?' 'I seen it since,' and that is all I know about it. Q. Did you ever suggest to them that they read to you? A. I used to ask them; yes, sir. Q. Was this expression ever used, 'Oh, to hell with you! I haven't time to read the paper?' A. No, she didn't say, 'To hell with me.' Q. What did she say? A. 'Oh, to hell with the paper! I ain't got time to read it.' Q. That was after the deed was made? A. After the deed was made. Q. How about writing for you? A. My son-in-law, when he go anywhere, always very kind to ask me to go with him; sometimes I go, sometimes I didn't, but I don't remember—he might—but I don't remember him asking me to take a ride with him after the deed was made. Q. I mean writing, how about their writing for you? A. Why, she wouldn't write for me. Q. What did she say? A. One time they were raising the old Harry in Washington, the West Land Company made a fence on the line—my boy was running the house, he keeps writing down, so I says to my daughter one night, I says, 'Lot, write me a few lines to Charlie and tell him to put the fence where it belongs; let him put it himself and take the fence there; that is mine, I

bought it; that will do for firewood.' She jumped up and threw up her hands and cussed and God-damned—'God damn the place! I wish I never seen it; it is a damned bother to me; "Write to Charley, write to Charley"; I am God damned tired writing, writing.' I said, 'Well,' I says, 'for God's sake, did your mother learn you that?' 'I don't give a God damn; all I can hear is "Write to Charlie, write to Charlie"; I am going to sell the damned place.' 'Well,' I says, 'if you don't want it, if it is a bother to you, give it back to me.' 'Not by a God damned sight; what am I going to have for taking care of you?' I says, 'It never cost you anything; you needn't take care of me; I can take care of myself or the county hospital can, but the place never cost you a nickel and you know it.' I paid all the taxes on that place since I owned it, up to this year, up to date."

There is but little, if any, conflict as to the physical condition of plaintiff prior to and after his wife's death and the making of the deed. There is no direct testimony that he was so weak-minded as to be incapable of understanding such a transaction as that of conveying his property to another, except as such an inference might be indulged from his physical and mental sufferings as testified to by many witnesses. Attorney Bell testified that plaintiff came to his office with defendants unsolicited by him. He had been attorney for defendant Harry Wyatt but had never before seen plaintiff. Defendant Harry Wyatt telephoned him that plaintiff wanted him to transact some business and was told to bring him to witness' office, which defendants did in the afternoon of July 30th. Witness testified that plaintiff was introduced to him by defendants and he thereupon stated his business, which was that he wanted to convey his property to Mrs. Wyatt; that witness explained to him fully what a deed meant, and that if he signed it he would lose all control of the property; that he had no form of gift deed and used the ordinary bargain and sale form; that he asked plaintiff if he knew what he was doing, if he had any other children and what other property he had; that plaintiff told him he wanted to give the property to Mrs. Wyatt; that he said he could not write but he touched the pen and Mr. Bell and a clerk in an adjoining office witnessed the signature. He testified: "I said to Mr. Soule, 'What do you want done with the deed, Mr. Soule?' He says, 'I want you to give it to Lottie, my

daughter.' She was still sitting here at the corner of the desk. I reached it over to her. She says to him, 'Do you want me to record this, Pa?' something to that effect. He said, 'Yes, I do.' Mr. Bell had the deed recorded and later sent it to Mrs. Wyatt. Plaintiff testified that he had no recollection definitely of what took place at Mr. Bell's office except as shown above. There is nothing in the record to cast doubt upon the truthfulness of Mr. Bell's testimony. It is quite conceivable, however, that plaintiff did not fully comprehend the effect of what he was doing and was not impressed by what was told him. His understanding was, as he testified, that he was not parting with control of the property or with the title, and that he knew nothing to the contrary until some time after the deed was made when his daughter claimed to own the property. He received one offer for the lot by letter and spoke to his daughter about selling it, and was then told it belonged to her and he could not sell it. This was all the property he had, and he repeatedly expressed his desire that his children should share it equally.

Appellants rely upon *Soberanes v. Soberanes*, 97 Cal. 140, [31 Pac. 910], "in which," it is claimed, "the circumstantial facts are almost identical with those in the instant case." The court said in that case, among other things: "The transfer of an aged mother by way of gift of all her estate to one of her sons to the exclusion of all her other children will not be set aside as constructively fraudulent, where it appears that the gift was made freely and voluntarily, and with full knowledge of all the facts and comprehension of the nature and effect of the transfer, and in the execution of a purpose long entertained by her, originating in a desire to show her appreciation of the son's devotion and services and without any undue influence or fraud on his part, although, by reason of her illiteracy and want of experience and knowledge of business affairs, she was not able, unassisted, to take care of her property, and by reason thereof was liable to be deceived and imposed upon by designing persons in the transaction of her business."

The testimony in the case now here presents a state of facts quite unlike those in the case cited. The deed was not only not made "in the execution of a purpose long entertained" by plaintiff, but in direct opposition to his frequently expressed desire—expressed, indeed, at the very time defend-

ants were suggesting that he convey the property to his daughter; nor was the deed made in appreciation of the daughter's "devotion and services," for no such consideration appears. And it may be doubted whether the deed was made "with full knowledge of all the facts and comprehension of the nature and effect of the transfer." There was testimony, accepted by the court as the findings show, from which it appeared that defendant Mrs. Wyatt conceived the plan of possessing herself of plaintiff's property before she urged him to take up his home with defendants. She said to Mrs. Charles Soule: "They think they are going to get it all, but wait until I get him down there; if he lives a week you bet I'll get it." To this same witness, speaking of how to manage plaintiff, she said: "You can't ruffle his feathers; you have to smooth him down the right way and you can do anything with him. Q. Did the old gentleman in his talks with you ever make any statement before he went down there as to the way he wanted to leave his property? A. It seems like that was on his mind all the time, yes; he always wanted share and share alike. 'They are all my children.' Q. Did they write any letters to Washington asking him to come down there? A. Yes; she wrote about every day when he was so bad, begged him to come down." It appeared that soon after plaintiff took up his residence with defendants the question of disposing of his property was brought up by his daughter, and it was she who proposed that it should be conveyed to her alone, but, as plaintiff testified, with the understanding that he retained the right to sell or dispose of it. She did not accomplish her purpose quite as soon as she said she would, but did so in about two or three weeks. The letter she wrote to her brother three days after the deed had been executed harks back to her original purpose and tends strongly to show her design in bringing her father under her own roof to live.

The complaint sets forth with much particularity the facts brought out by the evidence, and the averments were by the court found to be true. We think there was evidence sufficient to support the findings.

The judgment is affirmed.

Hart, J., and Ellison, J., *pro tem.*, concurred.

## MEMORANDUM CASES.

---

[Orim. No. 473. Second Appellate District.—March 7, 1916.]

In re EFFIE JOHNSON, on Habeas Corpus.

**HABEAS CORPUS.**—Prisoner remanded to custody.

**APPLICATION** for a Writ of Habeas Corpus directed to the Chief of Police of the City of Los Angeles.

The facts are stated in the opinion of the court.

William Durham, for Petitioner.

**THE COURT.**—The application of petitioner to be released from custody by the chief of police of the city of Los Angeles upon the ground that judgment of imprisonment was pronounced by the police court after 12 o'clock noon on Saturday is denied, for the reason that we find the preponderance of the evidence contained in affidavits filed touching the question shows that sentence was pronounced before noon on said day. It is therefore ordered that petitioner be remanded to custody.

[Civ. No. 1892. First Appellate District.—June 13, 1916.]

**CLARA W. SCOTT**, Petitioner, v. **SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO**  
et al., Respondents.

**CERTIORARI.**—Order annulled.

**APPLICATION for a Writ of Certiorari.**

The facts are stated in the opinion of the court.

**W. M. Abbott, W. M. Cannon, and C. H. Wilson**, for  
Petitioner.

**Mastick & Partridge**, for Respondents.

**THE COURT.**—It seems to us that that part of the return of the judge of the superior court reciting that all of the petitioners for general letters of administration requested that there be appointed a special administrator—and upon which particular reliance has been placed by the respondent as justifying the order sought to be reviewed in this proceeding—is quite immaterial, for the reason that the order which the court made and which the petitioner here is seeking to review expressly refers to another proceeding than an oral application for special letters of administration, to wit, to a formal proceeding in which a written application for letters of administration was filed; and that since no such written application for letters of administration was ever filed—and hence no such formal proceeding was before the court—the order of the court purporting to have been made in such formal proceeding must necessarily have been on the face of the record beyond the jurisdiction of the court. For that reason, and those appearing in the discussion of this matter before this court, the writ is granted, and the order sought to be reviewed is annulled.

## MODIFICATION OF OPINION.

---

[Civ. No. 1420. Third Appellate District.—January 7, 1916.]

**B. F. LYNIP, Respondent, v. ALTURAS SCHOOL  
DISTRICT OF MODOC COUNTY et al., Appellants.**

**OPINION AS REPORTED IN 29 CAL. APP. 158, MODIFIED.**

After the rendition of the opinion in the above-entitled case, as the same is reported in 29 Cal. App. 158, the district court of appeal of the third appellate district, on January 7, 1916, made the following modification thereof:

**THE COURT.**—It was unnecessary to pass upon the merits of the case, and as we have reached the conclusion that further consideration of the matter should not be foreclosed, that the portion of the opinion commencing with the words, "Moreover upon the merits," and extending to and inclusive of the word "guarantors," at the close of the opinion, is withdrawn.

# INDEX.

(795)



# INDEX.

---

**ACCIDENT INSURANCE.** See Insurance, 2-7, 11.

**ACCOMPLICE.** See Criminal Law, 5, 6, 47.

**ACCOUNTING.** See Guaranty, 4; Partnership; Trust.

**ADVERSE POSSESSION.** See Deed, 8.

**AGENCY.** See Broker; Deed, 4, 5; Insurance, 2-7, 13, 14-16; Mortgage, 4; Sale, 6, 7.

**ANIMALS.** See Fences.

## APPEAL.

1. **APPEAL FROM JUSTICE'S COURT—EXCEPTION TO SURETIES ON APPEAL BOND—NOTICE OF MUST BE FILED WITH JUSTICE.**—A notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justice's court, in order to be effectual, must be filed with the justice. (*McCarty v. Superior Court*, 1.)
2. **DISMISSAL—WRIT OF REVIEW—ORDER DISMISSING PETITION.**—A minute order dismissing a petition for writ of review, after the writ was granted, is not a judgment rendered upon the return of the inferior tribunal from which an appeal would lie, and the appeal should be dismissed; and under section 1075 of the Code of Civil Procedure, no hearing having been had after the return of the writ, the matter is still pending and should be heard. (*Frede v. Justice's Court of Los Angeles Township*, 85.)
3. **FAILURE TO FILE TRANSCRIPT—DISMISSAL.**—Where more than forty days have elapsed since an appeal from a judgment was perfected, and no transcript has been filed, or extension of time given within which to file such transcript, the appeal will be dismissed. (*Palmer v. Woodruff*, 251.)
4. **STATUTES CONFERRING RIGHT OF—CONSTRUCTION.**—The provisions of the statutes conferring the right of appeal and prescribing the procedure are remedial, and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court. (*Simmons v. Superior Court*, 252.)
5. **APPEAL FROM JUSTICE'S COURT—PAYMENT OF FEES.**—The purpose of the enactment of section 981 of the Code of Civil Procedure was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of pre-

**APPEAL (Continued).**

sending for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, it is a sufficient compliance with the statute. (Id.)

6. **NOTICE OF APPEAL—TIME OF.**—While a justice of the peace may not be required to accept for filing any notice of appeal not accompanied with payment of the fees, and assuming that a notice of appeal left with the justice, without the fees, cannot be deemed filed until payment of the fees, it being the duty of the justice to file the notice upon the payment of the fees, it will be deemed filed as of the date on which the fees were paid, where the payment is within thirty days after the rendition of judgment, and this is a sufficient compliance with the statute. (Id.)

7. **JUDGMENT BY DEFAULT—NOTICE OF ORDER OVERRULING DEMURRER—PRESUMPTION FROM RECORD.**—Upon an appeal taken from a judgment entered for failure to answer after demurrer overruled, it will be presumed that notice of the order overruling the demurrer was given, where such appeal is taken upon the judgment-roll without any statement or bill of exceptions. (Hooper v. Smith, 460.)

8. **APPEAL FROM ORDER DENYING NEW TRIAL—GROUNDS OF MOTION—SUFFICIENCY OF RECORD.**—Upon an appeal from an order denying a new trial, a review of the order is not precluded by reason of the omission to state the grounds of the motion or order, where the transcript shows that the appellants served and filed their notice of intention to move for a new trial, and such notice is set out with general specifications of error. (Whitcomb v. Worthing, 629.)

See Criminal Law, 1-3, 15; Estates of Deceased Persons, 1, 6; Findings, 4; Justice's Court, 9-11.

**APPEARANCE.** See Justice's Court, 6-8.

**ARSON.** See Criminal Law, 7-11.

**ASSAULT.** See Criminal Law, 13-18.

**AUTOMOBILE INSURANCE.** See Insurance, 16.

**BAIL.** See Criminal Law, 1-3.

**BANKS.** See Joint Tenants.

**BILL OF EXCEPTIONS.** See Costs.

**BONA FIDE PURCHASER.** See Deed, 5.

**BOND.** See Street Assessment, 1-3.

## BROKER.

1. **CONTRACT TO SHARE COMMISSIONS—STATUTE OF FRAUDS.**—The statute requiring contracts employing a broker to sell real estate to be in writing is not applicable to an agreement by one real estate agent to share with another agent the former's profit or advantage as the result of a sale or exchange of the properties of their principals, in the form of a fixed per centum on the valuation of the land taken by the principal of the latter in course of the exchange. (*Jenkins v. Locke-Paddon Co.*, 52.)
2. **CONSTRUCTION OF TERM "COMMISSION."**—The term "commission" should be given a broader meaning than merely that of a per centum valuation on the services of either agent; and, if it is made to appear that the first agent, by virtue of whatever understanding he may have with his principal, is to derive a definite advantage in the way of a material profit from the sale or exchange of his principal's property, and that such agent does derive such advantage from a transaction brought about through the co-operation and services of such second agent, as the result of an oral agreement between them, the statute of frauds is inapplicable, and the former must account to the latter therefor. (*Id.*)
3. **SALE OF REAL PROPERTY—FAILURE TO COMPLY WITH ACT OF MARCH 15, 1907—REFERENCE TO UNRECORDED MAP.**—Under the act of March 15, 1907 (*Stats. 1907*, p. 290), and amendments thereto, not only is the selling or offering for sale of lots of land in contravention of the provisions of this statute, by reference to an unrecorded map or plat, expressly prohibited, but the act makes it a misdemeanor so to do. (*King v. Johnson*, 63.)
4. **SALE BY AGENT—ILLEGAL TRANSACTION—ACTION FOR COMPENSATION.**—An agent, for the sale of land subdivided into lots, who offers the lots for sale with the full knowledge that the provisions of the act of March 15, 1907 (*Stats. 1907*, p. 290), requiring the filing of a map or plat of the subdivision, have not been complied with, cannot maintain a suit for his compensation, as the consideration for the contract is an illegal act. (*Id.*)
5. **CONTRACT—ILLEGAL CONSIDERATION.**—A contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy. (*Id.*)
6. **ILLEGAL TRANSACTION—EVIDENCE.**—Where the complaint in an action discloses the illegal transaction upon which plaintiff founds his right to recover, no evidence is admissible in support of the alleged cause of action. (*Id.*)
7. **PURPOSE OF STATUTE—RIGHTS OF INDIVIDUALS.**—The statute of March 15, 1907 (*Stats. 1907*, p. 290), was enacted, not as a revenue

**BROKER (Continued).**

measure, but as a declaration of the public policy of the state. Being in the interest of the public, in applying it, matters of private justice between individuals cannot be considered. (Id.)

8. **ACTION BY BROKER—RIGHTS OF VENDEES.**—The contention that the act of March 15, 1907 (Stats. 1907, p. 290), is intended for the benefit of vendees only, and should not be construed as affecting the right of a broker to recover for services rendered in selling lots in a subdivision by reference to an unrecorded map thereof, cannot be maintained. (Id.)

**BUILDING CONTRACT.** See Contract, 1; Mechanics' Liens.

**BURGLARY.** See Criminal Law, 12.

**CERTIORARI.**

1. **ANNULMENT OF PROCEEDINGS OF PUBLIC BODY—CAPACITY OF PETITIONERS.**—On *certiorari* proceedings to annul a resolution of the common council of a municipal corporation, the matter of the competency of the petitioners to sue, or the sufficiency of the petition in its statement of facts showing such competency, should be raised and determined by objection appropriately expressed by demurrer or motion to dismiss the proceeding, and where the objection is not thus raised, and the return to the writ has been made, the petitioners are not required to make proof of their capacity. (Rigdon v. Common Council of the City of San Diego, 107.)

2. **CERTIORARI.**—Order annulled. (Scott v. Superior Court, 793.)

See Appeal, 2; Justice's Court, 9; Municipal Corporations, 2.

**CLAIM AND DELIVERY.**

1. **PLEADING—DESCRIPTION OF PROPERTY—WAIVER OF OBJECTION.**—In an action in claim and delivery to recover certain oil paintings, where some of the paintings are not named in the complaint, but are definitely referred to as being pictures made by the plaintiff and at that time held in possession by the defendant, and it is alleged that the subjects thereof are not named and described, because they have escaped the memory of the plaintiff and that defendant has denied him access to the property, an objection to the complaint on the ground that the description of the paintings is insufficient should have been raised by demurrer for uncertainty, and it cannot be raised upon appeal, the complaint stating a cause of action and the defendant having met the issues by answering without demurrer. (Orchardson v. Christie, 8.)
2. **FORM OF JUDGMENT.**—A judgment in an action of claim and delivery providing, after ordering recovery of the paintings therein described, "that plaintiff is entitled to judgment for the sum of

**CLAIM AND DELIVERY (Continued).**

\$12,500 in the event that said pictures are not returned to the plaintiff herein by said defendant," but not using the original form of "do have and recover," etc., is sufficient, as the phrase "in the event that said pictures are not returned to the plaintiff herein by said defendant," is substantially the same as the statutory words, "in case the delivery cannot be had," when viewed in the light of the purpose of that provision in the statute. (Id.)

3. **ALTERNATIVE JUDGMENT.**—While in such an action a judgment must ordinarily be in the alternative, one that is not is not void, and whether or not it is even erroneous depends upon the facts of the particular case. (Id.)

4. **PLEADING—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER.**—In an action to recover the possession of a certain musical instrument in the possession of the defendant under a contract of conditional sale, the complaint is sufficient as against a general demurrer or a motion for judgment upon the pleadings, made upon the ground that the complaint does not state facts sufficient to constitute a cause of action, where the plaintiff's ownership and right to possession of the property is alleged, notwithstanding that there is no averment of default or breach of contract on the part of the defendant. (*Consolidated Music Co. v. Morrison*, 803.)

See *Lodging-house*, 2.

**COMMON LAW.**

**WHEN APPLICABLE—SECTION 4468, POLITICAL CODE.**—Under section 4468 of the Political Code the common law is the rule of decision only in those cases where it is not repugnant to or inconsistent with the constitution of the United States, or constitution or laws of this state. (*People v. Marsh*, 424.)

**COMMUNITY PROPERTY.** See *Husband and Wife*, 1.

**CONSIDERATION.** See *Broker*, 5; *Deed*, 4, 5; *Infants*, 1; *Promissory Note*, 2, 3, 12, 14; *Specific Performance*, 3, 4, 6.

**CONSTITUTIONAL LAW.** See *Election* 1; *Intoxicating Liquors*, 1, 2; *Juvenile Court*; *Office and Officers*, 4; *Street Assessment*, 4-6.

**CONTRACT.**

1. **BUILDING CONTRACT—AGREEMENT FOR BONUS—BREACH OF CONTRACT.** Where plaintiff and defendant entered into a contract whereby the latter sold the former certain lots in a subdivision of land, and agreed to give plaintiff a bonus in a certain amount if the latter would build on each lot a dwelling of a certain cost, according to certain plans, prosecute the work with diligence, and see that no

80 Cal. App.—51

**CONTRACT (Continued).**

mechanics' liens were filed against the property, plaintiff cannot recover the balance alleged to be due on the bonus, where the evidence shows that the buildings were not completed in the contract time, nor the property kept free from liens, and there were substantial defects in the buildings, to which plaintiff's attention was called and which were not remedied. (*Manning v. Broadmoor Improvement Co.*, 112.)

2. **DREDGING WORK—MATERIAL SUBJECT TO HALF MEASUREMENT—CONSTRUCTION OF SPECIFICATIONS.**—In this action to recover a balance alleged to be due on a written contract between plaintiff and defendant for certain dredging work in a portion of Oakland harbor, wherein the sole controversy was over the question whether payment for material dredged from the side slopes of the channel within specified areas should be made upon the basis of full measurement or half measurement of the quantity removed, it is held that the specifications of the contract are to be construed as requiring that payment should be made therefor upon the basis of half measurement. (*Standard American Dredging Co. v. City of Oakland*, 237.)
3. **EVIDENCE—CUSTOM.**—Where a contract for dredging work is susceptible of a reasonable interpretation as to how the payment for material dredged from side slopes of channels shall be made, without incorporating in it any extrinsic provisions by evidence of usage or custom, the admission of such evidence is not prejudicial. (*Id.*)
4. **EXECUTION WITH REFERENCE TO SPECIAL CIRCUMSTANCES—MEASURE OF DAMAGES.**—Where a contract is entered into by the parties thereto with reference to special circumstances known to both parties, the damages recoverable for a breach of the contract are not only those arising naturally therefrom and according to the usual course of business, but also those which under the special circumstances connected with the transaction flowed from the breach. (*Grosse v. Petersen*, 482.)
5. **CONTRACT FOR MANUFACTURE OF SOAP—DAMAGES.**—The measure of the plaintiff's damage for the defendants' willful and wrongful violation of a contract for the manufacture of soap according to a secret formula furnished by the former, is, where it is shown that the defendants had knowledge that the purpose of the plaintiff was to permanently establish a market for a soap of superior merit and value to be manufactured for him in exact accord with such formula, the difference between the plaintiff's actual expenditures in creating a market for the soap, including the value of his own services, and the sum received by him from the sales made of the soap delivered up to the time that the market which he had created had been destroyed in consequence of the breach of the contract; and, where it is also shown that such defendants had converted

**CONTRACT (Continued).**

the secret ingredient to their own use, the value thereof is to be added to the damage. (Id.)

6. **EVIDENCE—EARNINGS OF PLAINTIFF.**—In such an action it is not error to permit evidence of plaintiff's average earnings while employed by third parties in work similar in character and extent to the work which for some fourteen months he did in creating a market for his soap. (Id.)
7. **ACCEPTANCE OF INFERIOR SOAP—LACK OF WAIVER.**—The breach of such a contract is not waived by the ordering and acceptance of soap after the plaintiff had knowledge of some complaints as to the efficacy of the soap, where such complaints were few and of a vague character. (Id.)
8. **QUALITY OF SOAP—INSTRUCTION.**—In such an action it is not misleading to instruct the jury that if it was found that the defendant failed to furnish the plaintiff with "a high extra number one soap same quality as Pioneer Soap Company's Medallion soap," such failure constituted a breach of contract, where the evidence was confusing as to whether the basic ingredients employed in the manufacture of the soap in question were in anywise inferior to the basic ingredients usually employed in the manufacture of Medallion soap. (Id.)

See Broker; Guaranty; Husband and Wife, 4-7; Infants; Insurance; Municipal Corporations, 4-7; Railroad; Rescission; Sale; Specific Performance.

**CORPORATION.**

1. **ACTION BY CORPORATION—FORFEITURE OF CHARTER—SUFFICIENCY OF AVERMENT IN ANSWER.**—In an action brought by a corporation for damages for breach of contract, the incapacity of the plaintiff to begin or maintain the action because of the prior forfeiture of its charter is sufficiently put in issue, in the absence of special demurrer, by the averment in the answer "that the plaintiff is not now, or was at the time of the filing of the complaint, a corporation organized or existing under or by virtue of the laws of the state of California or of any state, and that prior to the commencement of this action the said plaintiff, after due and regular proceedings for that purpose had forfeited its charter as a corporation and as such ceased to exist, and ever since said time has ceased to be a corporation. (Kehrlein-Swinerton Construction Co. v. Rapken, 11.)
2. **CORPORATION LAW—FORFEITURE OF CHARTER FOR NONPAYMENT OF LICENSE TAX—EVIDENCE.**—The only competent proof of the forfeiture of the franchise of a corporation for the nonpayment of its license tax is the Governor's proclamation declaring such forfeiture, or a certified copy thereof, and the certificate of the

**CORPORATION (Continued).**

Secretary of the State as to certain data of record in his office is not sufficient proof thereof. (Id.)

**3. SUBSTITUTION OF DIRECTORS AS PARTY PLAINTIFF—FORFEITURE OF CHARTER PRIOR TO ACTION BROUGHT—RIGHT OF CORPORATION.—**

Where during the trial of an action brought by a corporation in its corporate name it is shown that the franchise of the corporation had been forfeited prior to the commencement of the action, the plaintiff has the right nevertheless to have the names of its directors as trustees substituted for its own name as party plaintiff. (Id.)

**4. SUBSTITUTION OF TRUSTEES—WHEN PROPER.—**

When in the course of an action it is brought to the attention of the court, either by the pleadings and proof of the defendant or by the suggestion of the fact on the part of the plaintiff, that the names of the trustees of the corporation should appear in the place of the corporation itself as party plaintiff, and when it clearly appears that the cause of action is unchanged and that the real parties in interest remain the same, and that the meritorious defenses of the defendant will be unaffected, and that the only purpose and effect of the proposed amendment is the mere formal change in the names of the party plaintiff without any change in the substantial rights and relations of the real actors in the case, the court should order the substitution made, and it is an abuse of discretion to refuse to do so. (Id.)

**5. STATUS OF DIRECTORS.—**The directors of every corporation, whether it has forfeited its charter or not, are the real persons and actors in actions begun by it or for its benefit, and this being so, it does not seem to be so material in what name they begin their actions so long as the identity of their act as the act of the corporation is undeniable. (Id.)

See Deed, 1; Guaranty, 2, 6; Vendor and Vendee, 2, 3.

**COSTS.**

**ORDER DENYING MOTION TO TAX—INSUFFICIENT NOTICE OF ORDER—SETTLEMENT OF BILL OF EXCEPTIONS ON APPEAL—MANDAMUS.—**

Where a motion to tax costs is made, a hearing had thereon and the matter submitted to the court for its decision, and an order is thereafter made denying the motion, the moving party is entitled to written notice of such decision, and a letter mailed by counsel of the successful party to counsel for the opposing party after the decision of the motion which makes no reference to the decision, but merely demands payment of the amount of such costs, is not a sufficient notice of such decision, and the trial court is not justified in refusing to settle the bill of exceptions proposed to be used upon appeal from the order denying the motion upon the ground that the bill was not presented within the statutory time after re-

**COSTS (Continued).**

cept of such letter, and *mandamus* will lie to compel such settlement. (*East Side Canal & Irr. Co. v. Superior Court*, 528.)

**COUNTY.**

**CLAIM AGAINST COUNTY—STATUTE OF LIMITATIONS—SECTION 4075, POLITICAL CODE.**—Under section 4075 of the Political Code, the supervisors cannot allow a claim against a county unless it is presented and filed with the clerk of the board within one year after the last item of the account or claim accrued, and where certain items of a claim against a county accrued more than one year prior to the presentation and filing of the account, they are barred, and the fact that one of the items accrued within the year does not revive the stale items. (*Welch v. County of Santa Cruz*, 128.)

See Office and Officers.

**COURTS.** See Criminal Law, 23, 24; Justice's Court; Juvenile Court; Superior Court.

**CRIMINAL LAW.**

1. **CONVICTION OF FELONY—ADMISSION TO BAIL PENDING APPEAL—DISCRETION.**—Admission to bail, pending an appeal from a judgment of a conviction of a felony, is a matter resting wholly in the discretion of the trial court, and the exercise of such discretion should not be disturbed or ignored except in an instance of manifest abuse. (*Matter of Presiado*, 323.)
2. **LIBERATION OF DEFENDANT—WHEN PROPER.**—Such discretion should not be exercised in favor of the liberation of the defendant except in instances where circumstances of an extraordinary character have intervened since conviction, which makes it obviously proper. (*Id.*)
3. **REFUSAL OF ADMISSION TO BAIL—ABUSE OF DISCRETION—ILL HEALTH OF DEFENDANT—SUFFERER FROM EPILEPSY.**—It is an abuse of discretion to refuse the application of a defendant for admission to bail pending an appeal from a judgment of conviction of embezzlement, where it is shown that he was suffering from epilepsy of the *grand mal* type. (*Id.*)
4. **ORDER SUSTAINING DEMURRER TO INFORMATION—DIRECTION FOR NEW INFORMATION—SECTION 1008, PENAL CODE.**—In a prosecution for obtaining money under false pretenses, where the court sustained a demurrer to the information, and made an order directing "that the district attorney may file a new information on the proceedings heretofore had, or any other proceedings that the district attorney may elect, as prescribed by section 1008 of the Penal Code," the order was a direction by the court to proceed further under section 1008 of the Penal Code, and the discretion given the district attorney, if any, was merely to make an election as to which one of the courses pointed out in the section he should take,

**CRIMINAL LAW (Continued).**

and he was authorized to proceed under the order to procure an indictment of the defendant for the offense charged in the information. (Matter of June, 767.)

5. **EVIDENCE—WITNESS AS ACCOMPLICE—WHEN QUESTION FOR JURY.**—In a criminal action it is for the jury to determine from the evidence whether, as a matter of fact, a witness is an accomplice, if the facts are disputed; and it is only where, the acts and conduct of a witness being admitted, they necessarily establish the witness' participation in the guilty act, or guilty relation thereto, that the court should determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice. (People v. Truax, 471.)
6. **BURNING OF INSURED PROPERTY—WITNESS AS ACCOMPLICE—QUESTION FOR JURY.**—In this prosecution for burning and destroying insured property with intent to defraud the insurer, in violation of section 548 of the Penal Code, it is held that the testimony of a certain witness did not constitute such an admission of guilty participation in the alleged crime as would warrant the court in declaring him to be an accomplice without leaving the fact to be determined by the jury. (Id.)
7. **SETTING FIRE TO PILE OF Baled HAY—EVIDENCE—VOLUNTARY CHARACTER OF CONFESSION.**—In a prosecution for the crime of having set fire to a pile of baled hay, an admission of guilt made by the defendant to the officer who arrested him, is not involuntary, because of the declaration made by the officer to him to tell the truth, after the defendant had so declared his intention. (People v. Wilkison, 473.)
8. **SUFFICIENCY OF PROOF OF CORPUS DELICTI.**—In such a prosecution the *corpus delicti* is sufficiently proven by the testimony of the officer who found the hay burning in his description of the conditions as he discovered them and of the character of the hay, together with its situation in an open lot, showing the fire was of incendiary origin. (Id.)
9. **PLEAS OF ONCE IN JEOPARDY AND FORMER ACQUITTAL—INSTRUCTION—DIRECTION TO FIND FOR PEOPLE UPON PLEA OF ONCE IN JEOPARDY—FAILURE TO FIND ON PLEA OF FORMER ACQUITTAL—EVIDENCE—LACK OF PREJUDICE.**—Where in such a prosecution the defendant in addition to his plea of not guilty interposed a plea of once in jeopardy, and of former acquittal, based upon the ground of variance between the charge and the proof in the first prosecution, there is no error in directing the jury that it should find for the people on the plea of once in jeopardy, nor is the defendant prejudiced by the omission of the jury to find on the plea of former acquittal, as the finding upon the former plea under the testimony relied upon in support of both pleas, necessarily included an adverse finding upon the plea of previous acquittal. (Id.)

## CRIMINAL LAW (Continued).

10. **EVIDENCE—SETTING OF SUBSEQUENT FIRES—ERROR NOT PREJUDICIAL.**—It is error to admit proof of the setting of a number of fires by the defendant after the fire in question, and upon the same night, but it is not sufficiently erroneous, where it appears from the whole evidence that the conviction of the defendant was justified. (Id.)
11. **INSTRUCTION—MALICE.**—In such a prosecution there is no error in giving to the jury the definition of malice as the same is found in subdivision 4 of section 7 of the Penal Code. (Id.)
12. **BURGLARY—RECEIVING STOLEN GOODS—ELECTION OF PROSECUTION.**—In a criminal prosecution, even if the evidence warranted a charge of burglary upon the theory that the defendant was an accessory thereto, where it also shows that the defendant subsequently received the fruits of the burglary from the actual perpetrator thereof, knowing them to be stolen, as defendant was guilty of receiving stolen goods, he cannot complain that the people elected to charge him with the latter offense rather than with the former. (People v. Day, 762.)
13. **ASSAULT WITH INTENT TO COMMIT ROBBERY—PLEADING AND PROOF.** Although the prosecution alleges in the information that an assault with intent to commit robbery was committed with a deadly weapon, to wit, a loaded revolver, it is not limited to the proof of that particular form and means of assault, and where the evidence is otherwise sufficient to justify a conviction, the fact that it was not proven that the assault was made with a deadly weapon, to wit, a loaded revolver, does not render the verdict unsupported by the evidence, as the words "with a deadly weapon, to wit, a loaded revolver" may be treated as surplusage. (People v. McInerney, 283.)
14. **INSTRUCTIONS—PROPER REFUSAL.**—In such a case there is no error in refusing instructions asked by the defendant touching alleged defect in proof as to the use of the particular weapon at the time of the assault; nor of instructions which were substantially covered by others given. (Id.)
15. **INSUFFICIENT RECORD ON APPEAL.**—Where there is no affirmative showing as to whether or not certain instructions were in fact given, the appellate court must resolve the uncertainty of the record in favor of supporting the judgment. (Id.)
16. **ASSAULT WITH INTENT TO MURDER—PRIOR THREATS—INSTRUCTION.** In a prosecution for the crime of assault with a deadly weapon with the intent to murder, the following instruction is not made erroneous by the modification embodied in the phrase and word shown in parentheses, to wit: "One who has received information of threats against his life or person made by another, is justified in acting more quickly and taking harsher measures for his own protection in event of assault, either actual or threatened.

**CRIMINAL LAW (Continued).**

than would be a person who had not received such threats; and if in this case you believe from the evidence (that the prosecuting witness made threats against the defendant and) that the defendant, because of (such) threats made previously to the transaction complained of by the prosecuting witness and communicated to the defendant either by the prosecuting witness or some other person, had reasonable cause to fear greater peril in event of an altercation with the prosecuting witness than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety." (People v. Bradfield, 721.)

17. **EVIDENCE OF PREVIOUS DIFFICULTIES—CONSIDERATION BY JURY.—PROPER INSTRUCTION.**—An instruction that the jury might consider the evidence of previous difficulties between the parties for the purpose of determining their state of mind at the time of the assault, as well as for the purpose of showing malice, is not erroneous. (Id.)
18. **JUSTIFICATION OF ATTACK—PROPER INSTRUCTION.**—An instruction that "to justify a person for attempting to kill another man upon the ground of self-defense, the attempt must be made under well-founded belief that it was absolutely necessary for such person to kill the other at the time to save himself from great bodily harm. The danger or harm must be present, apparent and imminent," properly states that the person acting in self-defense and resorting to the use of a deadly weapon must believe that it is absolutely necessary for him to so act in order to justify under the law. (Id.)
19. **EXTORTION—SENDING OF THREATENING LETTER—WRITING IN FOREIGN LANGUAGE—INFORMATION AND EVIDENCE—MATERIAL VARIANCE.**—In a prosecution for sending a threatening letter with intent to extort money and property, there is a fatal variance in the allegations of the information and proof received in support thereof, where the letter was written in the Italian language and the information set out the same as being in the English language, without any averment acquainting the defendant with the fact that the letter was written in the former language. (People v. Rizotto, 616.)
20. **EVIDENCE—FOREIGN DOCUMENT—WHEN INADMISSIBLE.**—Where an information is in fact based upon an instrument in a foreign language, which in the information is alleged to have been "in the words and figures following," followed by an English translation thereof, without disclosing the foreign origin of the document or the fact that the copy set out is a translation thereof, the original is not admissible in evidence as proof of such allegation. (Id.)
21. **PLEADING OF FOREIGN DOCUMENT.**—In such a prosecution, where the pleader is not content with the statement of the legal effect of a foreign document, it is not only the custom, but sufficient to allege, that it is in the foreign language adopted, a correct translation of

**CRIMINAL LAW (Continued).**

which is as follows, setting the same out according to its English meaning. (Id.)

22. **FAILURE TO PROVIDE FOR MINOR CHILD—LIABILITY OF FATHER AFTER DIVORCE—SECTION 270, PENAL CODE.**—The court in an action for divorce has the power to compel a father to support his children even though he is deprived of their custody, and where he willfully fails to do so, he is liable to prosecution under section 270 of the Penal Code, and the fact that he is imprisoned for failure to do so does not constitute imprisonment for debt in a civil action, within the meaning of the constitution, although the order for support was made by his consent, as the order derives its force from the power of the court and not from contract. (People v. Champion, 463.)
23. **VIOLATION OF FISH LAW—JURISDICTION OF SUPERIOR COURT—CONSTRUCTION OF CODE AMENDMENT OF 1915.**—Under the amendment of 1915 to section 636 of the Penal Code, (Stats. 1915, p. 606), the superior court has jurisdiction of the offenses defined in the various subdivisions of said section relating to the protection of fish, notwithstanding such subdivisions make a violation of the provisions a misdemeanor without specifying the penalty, as section 2 of such code section, which provides a punishment for the violation of any of the provisions of the section, has reference to all of said subdivisions, and is not confined to the violation of the provisions of said section 2. (People v. Anderson, 543.)
24. **CATCHING FISH BY NET—INFORMATION—SUFFICIENCY OF.**—It is not necessary in charging a defendant with unlawfully using a net for the purpose of taking fish in violation of subdivision 7 of section 636 of the Penal Code, that the information should state that the defendant was not one of the persons coming within the exception provided by subdivisions 10 and 12 of such section. (Id.)
25. **PLACE OF CASTING NET—SUFFICIENCY OF INFORMATION.**—In such a case it is not necessary that the information should allege that the defendant was using a net for the purpose of catching fish "in the waters of the state," where the charge is in the language of the statute, and it is further alleged that the net was cast for such purpose "at the extreme end of and within Fly's Bay in the County of Napa." (Id.)
26. **PUNISHMENT.**—A sentence upon conviction of such an offense to pay a fine of five hundred dollars, and, in default thereof, to be imprisoned in the county jail at the rate of one day for each two dollars of the fine is not excessive. (Id.)
27. **DRAWING CHECK WITHOUT SUFFICIENT FUNDS ON DEPOSIT—PLEADING AND PROOF.**—In a prosecution under section 476a of the Penal Code for fraudulently drawing a check without sufficient funds or credit with the drawee, it is not essential to a statement of the facts constituting such offense that the information should allege

## CRIMINAL LAW (Continued).

the check was presented to the one on whom it was drawn; nor is it necessary to establish such fact to sustain a conviction. (*People v. Weir*, 766.)

28. EVIDENCE—CRIMINAL INTENT—SIMILAR ACTS.—In such a case the criminal intent of the defendant in making and drawing the check is an essential element of the offense, and where he admits the act, but claims that it was free from felonious intent, proof of similar acts, even though they be independent and disconnected, committed either before or after the perpetration of the crime charged, are relevant and competent for the purpose of showing guilty intent. (*Id.*)
29. CONSTRUCTION OF STATUTE—HEADNOTES.—Headnotes of the sections of the codes as adopted in 1872 are integral parts of the codes themselves and are to be given effect according to their import. (*Matter of Wilson*, 567.)
30. PRESENTING FALSE PROOF ON CLAIM FOR ACCIDENT INSURANCE—CONSTRUCTION OF SECTION 549, PENAL CODE.—Section 549 of the Penal Code does not include the offense of presenting a false or fraudulent claim upon a contract of accident insurance, and one convicted under an information attempting to charge such an offense will be discharged on *habeas corpus*. (*Id.*)
31. IMPERSONATION — INFORMATION — ESSENTIALS OF.—An information charging one with impersonating another should allege affirmatively the things required by subdivision 3 of section 529 of the Penal Code, or else it should appear from the act of impersonation that the injury or the benefit referred to in the section would have been produced. (*People v. Chin You*, 18.)
32. KIDNAPING FOR PURPOSES OF EXTORTION OR ROBBERY—INTENT—EVIDENCE.—In a prosecution under section 209 of the Penal Code for maliciously, forcibly, or fraudulently taking or enticing away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, the intent with which such an unlawful act is performed, or the ultimate object which the actor has in view, may be shown by circumstances. (*People v. Fisher*, 135.)
33. CONSUMMATION OF PURPOSE UNNECESSARY.—In the commission of such a crime it is not necessary for the purpose charged in the information to be accomplished in order to make it effectual as an element of the crime; all that is required is that some overt act be done toward the execution of the purpose and the fulfillment of the intent. (*Id.*)
34. INSTRUCTION—AIDING OR ABETTING OF CRIME.—An instruction in a prosecution for such a crime, that all persons concerned in the commission of the crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or, not being

---

**CRIMINAL LAW (Continued).**

present, have advised and encouraged its commission, are principals in any crime so committed, is not prejudicially erroneous, where the jury is also instructed that they must acquit the defendant unless they believe beyond a reasonable doubt and to a moral certainty that he had the intent and purpose to extort from, or rob, the complaining witness, or to exact money or lands from his relatives or friends. (Id.)

35. **LARCENY—SALE OF MORTGAGED PERSONAL PROPERTY—SUFFICIENCY OF EVIDENCE.**—In a prosecution, under section 538 of the Penal Code, for selling mortgaged personal property consisting of heifers and cows without giving the requisite notice to either the mortgagee or the purchaser, where there was testimony relevant and competent to support the allegations of the information as to all material matters charged therein, the appellate court cannot revise the finding of the jury on the questions of fact. (*People v. Phillips*, 81.)
36. **ALLEGED BIAS OF JUDGE—CONFLICTING EVIDENCE.**—The contention in such a case that the trial judge was disqualified by reason of bias and prejudice on the ground that in a similar charge against the defendant, after conviction, and when probation was being applied for, he refused to approve an order for probation, and gave it as his opinion in that connection that the defendant should, for the offense there considered, be placed in the penitentiary, cannot be sustained on appeal, where affidavits of the deputy district attorney and the trial judge were filed contradicting the assertion of appellant as to any improper bias or prejudice. (Id.)
37. **CONSTRUCTION OF SECTION 487, PENAL CODE—LARCENY.**—By section 487 of the Penal Code, when property stolen is a cow, calf, etc., the crime is declared to be grand larceny, and, within the meaning of this section, "heifer" is synonymous with "cow," and it follows, therefore, that if, as section 538 of the Penal Code declares, the selling of mortgaged property without the prescribed notice makes the person guilty of larceny and makes him "punishable accordingly," the crime is either grand or petty larceny, dependent upon the kind or value of property taken. (Id.)
38. **INSTRUCTION—INTENT.**—In such a case, there was no error in instructing the jury that the intent with which the act alleged was done was not an element of the offense, and that when the intent is not made an affirmative element of the crime, the law interprets that the act knowingly done was of criminal intent, and it need not be alleged or proven. (Id.)
39. **CONSTRUCTION OF INSTRUCTIONS—RULE.**—Instructions are to be read in their entirety and not by segregated and separate portions, and although a single instruction in such a case, if it stood alone, might be susceptible of the interpretation that its language as-

## CRIMINAL LAW (Continued).

sumed that the facts charged against the defendant had been proved, where, in the body of the instructions given by the court, the jury was advised that it must find beyond a reasonable doubt all the allegations set forth in the information to be true, it cannot be contended that the instruction was prejudicially erroneous. (Id.)

40. **CONSENT TO SELL ALL OR PART OF MORTGAGED PROPERTY—FAILURE TO GIVE NOTICE OF SALE OF BALANCE—INSTRUCTION.**—There was no error in instructing the jury in such a case that if they should find that the defendant sold either or all of the five animals described in the information, they should convict him, although there was testimony given on the part of the mortgagee to the effect that he had authorized the mortgagor to sell two of the cows, where the information contained a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold. (Id.)
41. **PERMISSION TO SELL—RIGHT TO NOTICE.**—The giving of mere permission to sell mortgaged property does not work a waiver of the right to have notice of the sale furnished, for the mortgagor has a full right to sell without permission, provided he gives the notice prescribed by the statute. (Id.)
42. **PUNISHMENT—IMPRISONMENT AND FINE—CONSTRUCTION OF SECTION 672, PENAL CODE.**—Under section 672 of the Penal Code, upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed in said code, the court may impose a fine on the offender not exceeding two hundred dollars in addition to the imprisonment prescribed; and it was not error for the court in such a case to impose a fine of two hundred dollars, as well as imprisonment in the state's prison for a period of three years. (Id.)
43. **LARCENY—INADVERTENT REMARK OF COURT—ADMONITION TO DISREGARD—MISCONDUCT NOT PREJUDICIAL.**—In a prosecution for larceny, where the evidence offered in support of the charge tended to show that the defendant had entered into certain meretricious relations with the wife of the complaining witness during the absence of the latter from home, and that it was during the existence of such relationship that the crime was committed with the connivance and consent of the wife, no prejudice is suffered by the defendant from a remark made by the court during argument of counsel as to the admissibility of certain evidence tending to show adulterous relationship, to the effect that the defendant had "tried" to establish such intimacy in another way, where the court, immediately upon its attention being called to its inadvertent remark, instructed the jury to disregard it. (People v. Terramorse, 267.)
44. **ADULTEROUS RELATIONSHIP—EVIDENCE—ORDER STRIKING OUT TESTIMONY—INSTRUCTION TO DISREGARD—LACK OF PREJUDICE.**—Error

## CRIMINAL LAW (Continued).

in the admission of testimony which the prosecution claimed tended in some degree to show the existence of adulterous relations between the defendant and the wife of the complaining witness is cured, where such testimony is subsequently stricken out and the jury instructed to disregard it. (Id.)

45. **PREJUDICIAL MISCONDUCT OF DISTRICT ATTORNEY—IMPROPER QUESTIONS.**—It is prejudicial misconduct for the prosecuting officer to ask a character witness for the defendant if the defendant had not been dishonorably expelled from a fraternal organization of which the witness was a member, after objections to five previous questions, all relating to the same matter, had been sustained on the ground that such matter related to a time subsequent to the commission of the crime in question. (Id.)
46. **ARGUMENT TO JURY—PREJUDICIAL MISCONDUCT.**—It is also prejudicial misconduct for the prosecuting officer to comment upon the fact that the defendant had refused to permit his wife to be a witness in the case, where the record shows that the attitude of his wife was antagonistic to the defendant. (Id.)
47. **GRAND LARCENY—SUFFICIENCY OF EVIDENCE—CORROBORATION OF ACCOMPLICE.**—It is held in this prosecution for grand larceny that the testimony of an accomplice of the defendant was sufficiently corroborated to satisfy the statute. (People v. Hovis, 703.)
48. **LIBEL—CONFLICTING EVIDENCE—VERDICT CONCLUSIVE.**—In a prosecution for libel, where there is a substantial conflict in the evidence upon the matters constituting the libel, the verdict of the jury will not be disturbed on appeal. (People v. Matson, 288.)
49. **MAYHEM—REFUSAL OF INSTRUCTIONS—WHEN NOT ERRONEOUS.**—It is not error for the court in a prosecution for mayhem to refuse to give instructions offered by the defendant where the substance of the requested instructions is covered by the court's oral charge to the jury; nor is the court's refusal, in such a case, to state to the jury why it does not give the instructions prejudicial to the defendant. (People v. Maupins, 392.)
50. **VIEWING SCENE OF CRIME BY JURY—DISCRETION OF COURT.**—Granting or refusing the defendant's request, that the jury be permitted to view the premises where the offense was committed, is a matter within the discretion of the trial court, and its order refusing such request will not be interfered with on appeal where the record does not disclose any abuse of discretion. (Id.)
51. **TIME OF TRIAL—SECTION 1382, PENAL CODE.**—Under section 1382 of the Penal Code, providing that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, if a defendant, whose trial has not been postponed on his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information, where the defendant is

## CRIMINAL LAW (Continued).

brought to trial within the sixty days, but there is a mistrial, and the case is thereafter tried more than sixty days after the filing of the information, the mistrial constitutes "good cause," mentioned in said section, for the court's denying a motion to dismiss the information upon the ground that the action was not brought to trial within sixty days. (Id.)

52. **MURDER—SUPPORT OF VERDICT.**—In a prosecution for murder, where the testimony upon which the defendant was convicted was circumstantial, the judgment of conviction will not be set aside on appeal, where it cannot be said that there was not evidence to sustain the verdict, even though it cannot be said that a strong and convincing case was made out against the defendant. (People v. Fowler, 183.)
53. **CONTINUANCE—DISCRETION OF COURT.**—The granting or refusing a continuance in a criminal case is a matter largely in the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that the appellate court is justified in reversing such ruling. (People v. Ponchette, 399.)
54. **MURDER—REFUSAL OF CONTINUANCE—WHEN DISCRETION NOT ABUSED.**—In a prosecution for murder there was no abuse of discretion in refusing a continuance of the trial on the motion of the defendant where the application was made after the trial was commenced and proceeded to the extent of impaneling a jury, and the record shows that the defendant produced the testimony of other witnesses to prove an alibi pleaded, the continuance being asked on the ground of the absence of a witness who, it was claimed, would testify to the alibi. (Id.)
55. **EVIDENCE—IMPEACHMENT OF DEFENDANT—WHEN ERROR CURED.**—In a prosecution for murder, where the defendant testified to his age and the prosecution, to impeach him, called other witnesses to testify to previous statements of the defendant inconsistent with his testimony as to his age, but the court subsequently suggested to defendant's attorney that, if he would move to strike out the evidence, the motion would be granted, which was done, and the jury instructed to disregard the testimony, if the admission of the evidence was erroneous, it was rendered harmless by the later action of the court. (Id.)
56. **INSTRUCTIONS—FAILURE TO GIVE THROUGH INADVERTENCE—RECALLING JURY.**—Where the court in a murder case, through inadvertence, failed to give certain instructions to the jury requested by the defendant, but shortly after the jury retired, recalled it and, with the consent of defendant's counsel, gave them, the court's action was not prejudicial to the defendant's substantial rights. (Id.)
57. **MURDER—INTOXICATED CONDITION OF DEFENDANT—INSTRUCTION.**—An instruction in a prosecution for the crime of murder that "no

## CRIMINAL LAW (Continued).

act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in that condition, but, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that *the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act,*" is not erroneous, upon the theory that the plea of "not guilty" interposed by the defendant to the information limited the defense to the sole question as to the commission of the crime by the defendant, and that to have warranted proof of the intoxicated condition of the defendant, it was necessary to set up that fact by way of a special plea. (People v. Collis, 656.)

58. PLEA OF NOT GUILTY—DEFENSES PERMISSIBLE UNDER.—The plea of "not guilty" to a criminal charge admits of any defense which the facts justify, except those of once in jeopardy and former acquittal or conviction. (Id.)
59. APPLICABILITY OF INSTRUCTIONS UPON INTOXICATION—EVIDENCE OF DEFENDANT.—The defendant in such a prosecution cannot contend that instructions upon the subject of intoxication are inapplicable where he himself brings out the fact of his intoxicated condition at the time of the homicide. (Id.)
60. CONSIDERATION OF EVIDENCE OF INTOXICATION—INSTRUCTION—INFERENCE OF COMMISSION OF CRIME BY DEFENDANT UNWARRANTED. An instruction that "it is a well-settled rule that drunkenness is no excuse for crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, *for when a crime is committed by a party while in a fit of intoxication*, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Such evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution," is not erroneous upon the theory that the italicized portion trespassed upon the domain of fact by declaring that the defendant did the killing. (Id.)
61. PERJURY—FALSE STATEMENT IN ANSWER—AUTHORITY OF NOTARY.—In a prosecution for perjury based upon an alleged false statement in a verified answer in a civil suit, the defense that the notary who took the affidavit was not shown to be qualified because it was not proven that he had given the bond required by law, although his commission and oath of office were introduced in evidence, cannot be maintained, as his act in administering the oath would be valid as the act of a *de facto* officer. (People v. McLeod, 485.)

## CRIMINAL LAW (Continued).

62. **PROOF OF SIGNATURE.**—The testimony of the notary that he had seen the defendant write, and that in his opinion the signature attached to the affidavit in question was that of the defendant, was sufficient proof of the genuineness of the signature; and the certificate of the notary—that is the *jurat* attached to the affidavit—was also sufficient to furnish *prima facie* evidence of the making of the affidavit in the manner charged, the notary's act being authenticated by his official seal. (Id.)
63. **ARGUMENT OF DISTRICT ATTORNEY—STATEMENT THAT EVIDENCE OF PROSECUTION IS UNCONTRADICTED.**—In a prosecution for perjury it is not misconduct on the part of the district attorney in his argument to state that the testimony of the chief witness for the prosecution is uncontradicted, he also stating that the defendant was not compelled to take the stand, where there had been no evidence offered in defense. (Id.)
64. **RAPE—INSTRUCTIONS—PREJUDICIAL ERROR IN REFUSING.**—In a prosecution for rape, where the testimony of the prosecutrix was conflicting as to whether a statement which she claimed the defendant made to the effect that he was an officer and was about to arrest her, was made before or after the act of intercourse, it was prejudicial error for the court to refuse to instruct the jury, at the request of the defendant, that if they found that the prosecutrix' consent to the intercourse was obtained because of her belief that the defendant was an officer and that he was about to arrest her for alleged intoxication, and not because of threats to do her great bodily injury, the defendant was entitled to an acquittal. (People v. Cavanaugh, 432.)
65. **RAPE—EVIDENCE—CROSS-EXAMINATION OF PROSECUTRIX.**—In prosecutions for the crime of rape, while it is the duty of the trial court to exercise its discretion in the direction of permitting a very liberal, complete, and comprehensive cross-examination to be made of the prosecutrix, the mere fact that such discretion is not resolved as fully as it might have been in defendant's favor, does not justify a reversal of the judgment. (People v. Deatriek, 507.)
66. **IMPOTENCY OF DEFENDANT—PROPER CROSS-EXAMINATION.**—Where the defendant had introduced the testimony of two physicians tending to show that he was deficient in sexual power, and had also so testified in his own behalf, it is not error to permit the district attorney on cross-examination to ask him as to whether subsequent to the filing of the information, while staying at the house of a friend, he had not gone to the door of a woman's bedroom and asked permission to go into the room, saying: "I just want to see if I can raise my passions." (Id.)
67. **IMPOTENCY—QUESTION FOR JURY.**—It is for the jury to say whether the defendant was impotent and utterly incapable of performing the act with which he was charged. (Id.)

## CRIMINAL LAW (Continued).

68. **ILlicit RELATIONSHIP OF PROSECUTRIX WITH THIRD PERSON—EXCLUSION OF LETTERS—LACK OF PREJUDICE.**—It is not prejudicial error to refuse to admit in evidence certain letters and cards of an intimate and confidential tenor, which passed through the mails between a third person and the prosecutrix, where it is shown by other evidence that the latter sustained illicit relations with such person. (Id.)
69. **WILLINGNESS OF DEFENDANT TO SUBMIT TO PHYSICAL EXAMINATION—IMPROPER CROSS-EXAMINATION—INSTRUCTION TO DISREGARD—LACK OF PREJUDICE.**—It is error to ask the defendant on cross-examination as to whether he would be willing to submit himself for examination to a physician whom the court might select for the purpose of determining the condition of his sexual organs, but such error is not prejudicial, where the jury is instructed to disregard the testimony. (Id.)
70. **ROBBERY—ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO ARREST OF DEFENDANT'S WIFE—WHEN NOT PREJUDICIAL.**—In a prosecution for robbery, it is not prejudicial misconduct on the part of the district attorney in argument to call attention to the interest of defendant's wife, and to the fact that she is under arrest and out on bail, where it is conceded that the jury must have known that she was jointly charged with the defendant in the crime, and the evidence shows that she was a party thereto. (People v. Cherry, 285.)
71. **ALLEGED MISCONDUCT OF COURT—WHEN NOT SHOWN.**—In a prosecution for robbery, where the jury after retiring, failed to agree, and on being called before the court attempted to learn how the court would regard a recommendation for probation, intimating that a verdict could be reached if such recommendation should be acted upon favorably, but the court stated that, while it would be glad of any recommendation, it would not promise to follow it, and that it was the duty of the jury, irrespective of what punishment would follow, to find its verdict from the law as given by the court and applied to the facts, and the jury thereafter rendered a verdict of guilty with a recommendation for probation, it cannot be contended that the court coerced the jury into finding a verdict of guilty; nor can such contention be made upon the ground that the court, in urging the jury to reach a verdict, referred to the time consumed in the trial and the large expense incurred therein, the court saying nothing to indicate what the verdict should be. (Id.)
72. **ROBBERY—INSTRUCTIONS—BAD REPUTATION OF DEFENDANT.**—In a prosecution for robbery there was no error in the court's refusing to instruct the jury, at the request of the defendant, in substance, that if they believed from the evidence that defendant had in the past been leading a wild and immoral life and had been

**CRIMINAL LAW (Continued).**

guilty of acts which they deemed to be immoral or unlawful, or had an unsavory reputation, such facts should not be considered by them in determining the question of defendant's guilt or innocence of the crime charged, but that the same degree of proof was required to establish his guilt as that required to establish the guilt of any person charged with a similar offense, there being no issue as to the past life, character, or reputation of the defendant, and no evidence upon the subject, although a witness for the people testified that he and defendant went and hunted for some opium, and that the defendant informed him that the opium had been hidden at a certain place and if found could be sold to a Chinaman. (People v. Waugh, 402.)

**73. ARGUMENT—COMMENT UPON DEFENDANT'S FAILURE TO TAKE STAND.**

It is fundamental that, since a defendant may not be compelled to be a witness against himself, a prosecuting officer may not comment adversely upon his failure to take the stand in his own behalf; but a statement made by the district attorney in his argument that defendant's possession of the stolen property shortly after the robbery was unexplained by any sworn testimony, did not violate this rule. (Id.)

**74. ROBBERY—APPEAL—WHEN VERDICT CONCLUSIVE.—A verdict of conviction of the crime of robbery is conclusive upon appeal, where**

the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict. (People v. Pasqueria, 625.)

**75. EVIDENCE—RECALL OF PROSECUTING WITNESS—LACK OF PREJUDICE.**

In a prosecution for the crime of robbery the substantial rights of the defendant are not prejudiced by the action of the court in recalling the prosecuting witness after the close of the people's case, and interrogating him as to the taking of money from his pocket by the defendant, where such interrogation was for the purpose of clearing the mind of the court upon that part of the witness' testimony. (Id.)

**76. DEPOSITION TAKEN AT PRELIMINARY EXAMINATION—ABSENCE OF WITNESS.—The deposition of a witness given at a preliminary examination may be admitted in evidence upon a showing that the witness has left the state and will not return. (Id.)****77. OBJECTIONS TO QUESTIONS—RIGHT TO MAKE AT TRIAL.—Such a deposition is subject to the same objections as though the witness were present and testifying, and the fact that no objections were interposed by the defendant when the testimony was given does not bar him from objecting when the same is read at the trial. (Id.)**

See Habeas Corpus; Intoxicating Liquors, 3.

**CUSTOM.** See Contract, 3.

**DAMAGES.** See Contract, 4, 5; Fences, 3; Negligence, 21; Sale, 4, 5, 10, 12.

**DEED.**

1. **RAILROAD RIGHT OF WAY—DURATION OF ESTATE—CONSTRUCTION OF INSTRUMENT.**—A deed to a railroad corporation which recites that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveys the land described in such deed to the railroad company and its successors "during the legal existence of said company, solely upon the following conditions [here follow certain conditions] . . . ; and upon the breach . . . of any of the aforesaid conditions, this grant shall become void, and the estate hereby conveyed . . . shall cease and determine, and the said land shall absolutely revert to the said party of the first part (grantor), his heirs or assigns, in fee simple . . . and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary," shows an intention to limit the duration of the grant to the period of the legal existence of the company, and not an intention to irrevocably dedicate the land to railroad use upon a condition subsequent. (*East San Mateo Land Co. v. Southern Pacific R. R. Co.*, 223.)
2. **CONVEYANCE OF REVERSIONARY INTEREST—CONSTRUCTION OF DEED.**—A deed, made by the successor in estate of the grantor, conveying a large tract of land within which such right of way was included, conveys to the grantee the reversionary interest of the grantor therein, notwithstanding such right of way is reserved and excepted in the granting clause, where such clause is immediately followed by an explanatory provision showing an intent and purpose on the part of the grantor to convey such right of way to the grantee. (*Id.*)
3. **CONSTRUCTION OF DEEDS.**—In construing a deed every provision, clause, and word shall be taken in consideration in ascertaining the meaning of the grantor, whether words of grant, of description, or words of qualification, restraint, exception or explanation, and every word shall be presumed to have such force and effect as it can have. (*Id.*)
4. **CONVEYANCE TO AGENT FOR SPECIFIC PURPOSE—BREACH OF TRUST—RELIEF—LACK OF CONSIDERATION.**—A grantor of real property who makes a conveyance thereof to an agent for the purpose of enabling such agent to complete a represented sale of the property for the former, is entitled, upon a breach of the trust by the agent, to relief in equity upon the ground of failure of consideration. (*Koch v. Wilcoxon*, 517.)
5. **PURCHASE OF PROPERTY AT EXECUTION SALE—NOTICE OF LIS PENDENS IN QUIET TITLE ACTION—STATUS OF PURCHASER.**—An execu-

**DEED (Continued).**

tion creditor of the grantee under such a deed who purchases the property at the execution sale is not an innocent purchaser thereof for value, as against the real owner, where he has constructive notice of a *lis pendens* filed by the real owner in an action to quiet title to such property as against the grantee. (Id.)

6. **CONVEYANCE BY WIFE TO HUSBAND—LIFE ESTATE.**—A deed of grant by a wife to her husband providing that the property is conveyed to the latter "so long as he shall live, but at his death the said above-described property to revert to the heirs of the said party of the first part," followed by other general terms to the effect that all and singular the tenements, appurtenances, etc., were to pass "unto the said party of the second part, his heirs and assigns forever," passes only a life estate to the grantee. (*Whitecomb v. Worthing*, 629.)
7. **CONSTRUCTION OF DEEDS.**—Deeds are to be construed like any other contracts, and the intent of the parties arrived at by a consideration of the whole instrument and not of detached clauses. (Id.)
8. **PURCHASE OF LIFE ESTATE—ADVERSE POSSESSION—RUNNING ON STATUTE.**—Title by adverse possession to property conveyed by such deed cannot be acquired by the purchaser of such life estate against the heirs of the original grantor during the lifetime of the grantee named in the deed, and the statute of limitations, therefore, does not begin to run against such heirs until the death of such grantee. (Id.)

See Easement; Fraud; Irrigation District; Railroad.

**DIVORCE.**

1. **ACTION FOR DIVORCE—DECREE OF FOREIGN STATE—LACK OF JURISDICTION—NONRESIDENCE—DEFENSE.**—In an action for divorce a defense based upon a decree dissolving the marriage in a foreign state antedating the action cannot be sustained where the law of the foreign state provided that the applicant must be a *bona fide* resident of the state for the period of one year immediately preceding the bringing of the action, and it was found that the parties were during said time nonresidents of the state. (*Steinbroner v. Steinbroner*, 673.)
2. **JUDGMENT OF FOREIGN STATE—WANT OF JURISDICTION—COLLATERAL ATTACK.**—Jurisdiction of a court of a foreign state to render a judgment is always open to collateral attack in a proceeding in another state, and the record of the judgment in the foreign state may be contradicted as to the fact necessary to give the court jurisdiction. (Id.)

See Criminal Law, 22.

**EASEMENT.**

1. **DIVISION OF LAND INTO PARTS—GRANT OF ONE PART—RIGHT TO EASEMENT IN REMAINING PART.**—Where an owner of land divides it into two parts and makes a grant of one of such parts, such grant, by implication, includes all such easements in the remaining part as are necessary for the reasonable enjoyment of the part granted in the form in which it was used at the time of the transfer. (*Rodemeyer v. Meger*, 514.)
2. **RIGHT OF USER OF IRRIGATING DITCH OVER RESERVED LAND—CHARACTER OF USER AT TIME OF GRANT—FAILURE TO FIND ON MATERIAL ISSUE.**—Where in an action to enjoin interference with the user by the plaintiff of an irrigating ditch extending over the land of the defendant, through and by means of which plaintiff claimed the right to conduct a flow of water for irrigating his land, which land was purchased by him from the defendant, it is alleged in the answer that the ditch at the time of the conveyance of the land to the plaintiff was but of a temporary character, it is essential to support a judgment in favor of the plaintiff that the court should have found whether such ditch was of a temporary or of a permanent character at the time of such conveyance. (*Id.*)

See *Eminent Domain*, 1.

**ELECTION.**

1. **SUPERIOR COURTS—ORIGINAL JURISDICTION—CONSTITUTIONAL LAW.**—The original jurisdiction of the superior courts by virtue of article VI, section 5, of the constitution extends to sundry subjects declared in such section and to "all such special cases and proceedings as are not otherwise provided for," which means necessarily that wherever a case, or cause, exists which is outside the scope of those directly mentioned in such section, and jurisdiction thereof has not been vested in any other court or official body authorized to exercise judicial functions, the jurisdiction to hear and determine such special case is vested in the superior court. (*Roche v. Superior Court*, 255.)
2. **ELECTION CONTEST UNDER LOCAL OPTION LAW—JURISDICTION OF SUPERIOR COURT.**—The right to contest an election held pursuant to the provisions of the "Wyllie Local Option Act" (Stats. 1911, p. 599) is a special case within the jurisdiction of the superior court, in view of the fact that section 9 of such act gives the right to make such a contest and that no other court is vested with jurisdiction thereof. (*Id.*)
3. **PROCEDURE—INAPPLICABILITY OF CODE—SILENCE OF STATUTE—POWER OF COURT.**—The fact that the provisions of the Code of Civil Procedure on election contests are in some respects not applicable to the contest of an election held under the local option law, and that there is no provision made by statute prescribing who

**ELECTION (Continued).**

shall represent the people, or how the representative of the people shall be cited or served with process, does not cause such a contest to fail for want of legal parties or procedure, as the court, under the provisions of section 187 of the Code of Civil Procedure, has power to adopt a suitable procedure which will furnish an opportunity for interested parties to appear at the hearing. (Id.)

4. **NECESSITY OF CONTESTER.**—In order to make effective the right of contest it is not necessary that some statute shall designate a contestee selected to represent the public and who must be cited to appear before the court in such proceeding, as it is not in the ordinary sense an adversary proceeding. The public are interested in having a correct determination of the result of the election, and since it is provided that any elector may contest the declared result of the election, it is implied that the court will permit any other elector to oppose such contest so far as necessary for a just and lawful disposition of the proceeding. (Id.)
5. **HEARING OF CONTEST—NOTICE—PUBLICATION IN NEWSPAPER—SERVICE OF CITATION UPON PRESIDENT OF TRUSTEES OF MUNICIPALITY—SUFFICIENCY OF.**—An order directing the publication of notice of the time and place of hearing the contest of an election, held under the local option law, for two weeks in a newspaper published in the city where such election was held, and that service of a citation be made upon the president of the board of trustees of such city, is sufficient. (Id.)

**EMINENT DOMAIN.**

1. **ACTION TO CONDEMN EASEMENT—MOTION FOR NEW TRIAL—TIME FOR SERVING AND FILING NOTICE OF INTENTION.**—In an action for the condemnation of an easement, where the issues of public use and public necessity are first heard and determined by the court, and the issue of damage is thereafter determined by a jury, the time to serve and file a notice of intention to move for a new trial runs from the time of entry of the findings and judgment, and not from the date of the verdict. (*San Joaquin and Kings River Canal and Irr. Co. v. Stevenson*, 405.)
2. **SPECIAL ISSUES—TRIAL BY JURY—MOTION FOR NEW TRIAL—TIME FOR SERVING AND FILING NOTICE OF INTENTION.**—The time for serving and filing a notice of intention to move for a new trial begins to run when the verdict is rendered, where all the issues in the case are tried by a jury, but where some special issue, not determinative of the case, has been tried by a jury, the time does not begin to run upon the rendition of the verdict upon such special issue, but from the entry of the judgment. (Id.)
3. **TRIAL BY JURY—CONSTRUCTION OF SECTION 659, CODE OF CIVIL PROCEDURE.**—The determination by a jury of some single isolated issue

**EMINENT DOMAIN (Continued).**

of fact in a case is not "the trial by jury" referred to in section 659 of the Code of Civil Procedure, where there remain other issues undisposed of. (Id.)

4. **AMENDMENT OF 1915—MEANING OF TRIAL.**—In changing the phraseology of section 659 of the Code of Civil Procedure in the amendment of 1915, the legislature did not intend that the word "trial" used in the section should mean anything different from the words "the action was tried" found in former statutes. When the legislature used the word "trial," it must have intended to refer to the action being tried, and not alone to some one or more issues of fact to be submitted to the jury not decisive of the case. (Id.)
5. **TRIAL—WHAT CONSTITUTES.**—In order to constitute a trial, all the issues raised by the pleadings must be actually or ostensibly disposed of, and there must be such proceedings, after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. (Id.)
6. **DETERMINATION OF QUESTION OF USE AND NECESSITY—ISSUES OF FACT—DETERMINATION BY COURT.**—In condemnation cases, the questions of use and necessity are exclusively for the court to determine, and these are issues of fact, though withheld from the jury, which must be determined by the court before final judgment of condemnation can be entered, and until found upon by the court there is no "trial" of the action as contemplated by section 659 of the Code of Civil Procedure. (Id.)
7. **ORAL OPINION OF JUDGE NOT EQUIVALENT TO FINDINGS.**—Although the judge, in such a case, announced orally from the bench his conclusion as to the questions of use and necessity, this was in no legal sense equivalent to findings which the law requires him to make in writing and file with the clerk within thirty days after the cause is submitted for decision. (Id.)

**EMPLOYER AND EMPLOYEE.** See Master and Servant.

**EQUITY.** See Injunction; Nuisance; Specific Performance.

**ESTATES OF DECEASED PERSONS.**

1. **ORDER SETTING APART HOMESTEAD—QUANTITY IN EXCESS OF STATUTE—FAILURE TO APPEAL—TITLE OF WIDOW.**—An order setting apart to the widow of a deceased person as a probate homestead a quantity of land exceeding twenty acres in extent under the homestead law which then provided that such a homestead should not exceed twenty acres in extent, is not void, as being in excess of the jurisdiction of the court, and where such order has not been appealed from, the title to the homestead under the order is vested in the widow in fee. (Rountree v. Montague, 170.)

## ESTATES OF DECEASED PERSONS (Continued).

2. **NATURE OF PROBATE PROCEEDINGS.**—Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings *in rem*, and judgments therein so far as they relate to the disposition of the property of the estate are binding upon the parties interested. (Id.)
3. **JURISDICTION—VALIDITY OF JUDGMENT—ERROR.**—The only question to be considered upon the hearing of an application for probate homestead is, did the court have authority to determine the subject matter of the controversy and jurisdiction over the thing proceeded against; and where the court has jurisdiction, mere error in its judgment will not vitiate the decrees. (Id.)
4. **SPECIFIC DEVISE—HOMESTEAD RIGHT NOT AFFECTED.**—The right of the widow to such a homestead is not affected by reason of the fact that the premises out of which it was carved were specifically devised to her for life, in the absence of anything in the will to show that the testator intended the specific devise of a life estate to his wife to be in lieu of any rights which she might acquire under the statutes making provision for a probate homestead to her as his widow. (Id.)
5. **NATURE OF HOMESTEAD RIGHT OF WIDOW.**—The right of a widow to a probate homestead is an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise. (Id.)
6. **SALES OF REAL ESTATE—PAYMENT OF FAMILY ALLOWANCE AFTER MARRIAGE—FAILURE TO APPEAL—VALID ORDERS.**—Orders authorizing and confirming sales of real estate to pay the amount of the family allowance accruing subsequent to the marriage of the widow of the deceased, are not subject to attack, where no appeal was ever taken therefrom, and the purchaser of the property at such sales acquires a valid title thereto. (Id.)
7. **ORDER FOR FAMILY ALLOWANCE—FRAUD.**—An order of sale of real estate of a deceased person is not subject to attack on the ground of fraud and conspiracy in the administration of the estate in keeping such family allowance alive after the widow's marriage, where no proof of such fraud is shown other than by the record itself, from which it appears that the court was fully advised of such marriage, and it is also made to appear that no decision had ever been made, at that time, to the effect that an order for family allowance ceased on the marriage of the widow. (Id.)
8. **JUDGMENT—ATTACK FOR FRAUD—ESSENTIALS.**—A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic or collateral to the matter which was tried and determined. (Id.)
9. **SPECIFIC DEVISE—HOMESTEAD—LACK OF ESTOPPEL.**—The widow in such a case is not estopped from claiming that she acquired the fee

**ESTATES OF DECEASED PERSONS (Continued).**

in the homestead premises by virtue of the fact that she took under the will a life estate in another part of the premises, in the absence of anything in the will or otherwise putting her to an election. (Id.)

See Inheritance Tax; Promissory Note, 1.

**ESTOPPEL.** See Estates of Deceased Persons, 9; Insurance, 16; Pawnbroker, 1; Pledge, 3.

**EVIDENCE.** See Broker, 6; Contract, 3, 6; Criminal Law, 5-10, 13, 17, 20, 28, 32, 35, 44, 47, 49, 55, 59, 62, 65-69, 73-77; Guaranty, 6, 11; Husband and Wife, 3, 5; Insurance, 13; Irrigation District, 3, 5; Joint Tenants, 2; Mortgage, 4; Negligence, 1, 6-10, 20, 23, 27-30; Promissory Note, 2-7, 12; Sale, 1, 2, 4, 9-11.

**EXECUTION.**

1. **SALE ON EXECUTION—VALIDITY OF—ERROR IN DATE OF JUDGMENT.**—An execution sale of real property is not void as against a purchaser for value because the writ of execution misstated the date of the judgment, stating the date of a first judgment, which was set aside on appeal, instead of a second judgment, being in all other particulars regular and conforming to the second judgment, properly stating the amount thereof. (*Morris v. Winans*, 575.)
2. **AMENDMENT OF WRITS—POWER OF COURT.**—The power of courts to amend writs issuing from them, when defective or irregular, has long been exercised, and in modern times with increasing frequency; nor is it easy to prescribe definite limits to the power; and it is also settled that, if the writ be amendable, it will be accorded the same effect with reference to acts done in execution of it, as if it had been amended. (Id.)
3. **VALIDITY OF EXECUTION.**—If a writ of execution be merely erroneous—that is to say, voidable—a sale under it to a *bona fide* purchaser will be valid, although the execution be afterward set aside; but if the execution be irregular—that is to say, void—a sale under it, even to a *bona fide* purchaser, will also be void. (Id.)
4. **CERTIFICATE OF SALE—VALIDITY OF.**—Where a certificate of sale by the sheriff under execution declares that he offered the property for a certain sum, although the provisions of the code regulating the matter of execution sales require the sheriff to offer the property to the highest bidder at public auction, this will not invalidate the sale where it appears upon an examination of the whole document that there are ample recitals to the effect that the property was sold at public auction in accordance with the statute, and that the purchaser was the highest bidder. (Id.)

See Deed, 5.

**EXECUTORS AND ADMINISTRATORS.** See *Estates of Deceased Persons*.

**EXTORTION.** See *Criminal Law*, 19-21.

**FEES.** See *Appeal*, 5, 6; *Justice's Court*, 1.

### **FENCES.**

1. **ANIMALS—TRESPASS LAW OF 1907—EFFECT UPON FENCE LAW OF 1878—LOS ANGELES COUNTY.**—The act of 1878 concerning the trespassing of animals upon private lands in certain counties in the state of California (Stats. 1877-78, p. 176), which act and the provisions thereof were, by an amendment thereto approved March 30, 1878, (Stats. 1877-78, p. 78), made to include the county of Los Angeles, was not, as to such county, repealed by the act of 1907 (Stats. 1907, p. 999), and therefore in such county, an action for damages for trespass by animals can be maintained, irrespective of whether or not the land trespassed upon was inclosed, or whether or not it was planted to crops growing or matured. (*Hicks v. Butterworth*, 562.)
2. **REPAIR OF FENCE—FAILURE TO CLOSE GATES—IMMATERIAL MATTERS.**—In an action to recover damages for trespass by cattle in entering upon the land and destroying growing alfalfa and sacks of hay thereon, it is immaterial, in the county of Los Angeles, that the plaintiff failed to keep the fence inclosing his land in repair, or that he failed to keep the gates leading thereto closed. (*Id.*)
3. **DAMAGES TO CROPS—PLAINTIFF AS TENANT—EXTENT OF RECOVERY—INSTRUCTION.**—In such an action there is no error in refusing to instruct the jury that, if the plaintiff was not the owner of the land, but leased it upon the terms and conditions known as "farming on shares," and the crops growing thereon belong partly to the plaintiff and partly to the owner of the land, the plaintiff could only recover for damages done to that portion of the crop belonging to him, where by the terms of the lease the owner had no interest in the crop until the same had been set apart to him by the plaintiff, and the evidence failed to show that a division had been made at the time of the trespass. (*Id.*)

### **FINDINGS.**

1. **UNCERTAINTY—CONSTRUCTION—SUPPORT OF JUDGMENT.**—The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. (*Cooley v. Brunswick Drug Co.*, 58.)

**FINDINGS (Continued).**

- 2. FAILURE TO SERVE ADVERSE PARTY—JUDGMENT NOT VOID ON FACE.**—A judgment is not void on its face by reason of the failure of the party directed to prepare findings to serve a copy of such proposed findings, as provided by section 634 of the Code of Civil Procedure, upon all other parties to the action at least five days before such findings are signed. (*California Central Creameries Co. v. Crescent City Light, Water and Power Co.*, 619.)
- 3. ORDER DIRECTING PREPARATION OF FINDINGS.**—An order directing the preparation of findings is not a part of the judgment-roll, and, therefore, an inspection thereof would not disclose that such direction was given. (*Id.*)
- 4. APPEAL FROM JUDGMENT—WAIVER OF SERVICE OF PROPOSED FINDINGS—RECORD.**—Upon an appeal taken from a judgment upon the judgment-roll and a statement on appeal, it will be presumed that the appellant waived service upon him of the proposed findings, where the statement shows that the respondent was directed to prepare findings, and that they were prepared and signed on the same day, and no affirmative showing made that the appellant did not consent to such waiver of service. (*Id.*)
- 5. WAIVER OF SERVICE OF PROPOSED FINDINGS.**—The amendment to section 634 of the Code of Civil Procedure, requiring service of proposed findings at least five days before signing, was passed solely in the interest of parties litigant, and its provisions may be waived by them. (*Id.*)

See Eminent Domain, 7; Lodging-house; Negligence, 2-4.

**FIRE INSURANCE.** See Insurance, 12, 13.

**FISH AND GAME.** See Criminal Law, 23-26.

**FORFEITURE.** See Corporation.

**FRATERNAL INSURANCE.** See Insurance, 2, 3.

**FRAUD.**

**ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.**—In this action to have set aside and declared void a deed made by an aged father of all his property to one of his daughters to the exclusion of his other children, on the ground that the execution of the deed was procured through the frauds and misrepresentations of such daughter, and by the undue influence exerted by her upon him at a time when he was enfeebled in mind and health and incompetent to make a deed or dispose of his property, it is held that the findings that the allegations of the com-

**FRAUD (Continued).**

plaint were true are supported by the evidence. (*Soule v. Wyatt*, 778.)

See Estates of Deceased Persons, 7; Rescission.

**GIFT.****GIFTS OF MONEY—ACTION TO SET ASIDE—INSUFFICIENCY OF EVIDENCE.—**

In this action to have two certain gifts of money, made by a deceased person in her lifetime to a friend with whom she made her home for many years, set aside on the ground of mental incapacity and undue influence, it is held that the plaintiff failed to establish any sort of trust or fiduciary relation between the parties; or that the gift was secured by undue influence exercised over the donor; or that she was mentally and physically incompetent or in any degree incapable of managing her own affairs or comprehending the nature of the transaction by which she parted with all her property, or that she needed independent advice. (*Lovejoy v. Hart*, 664.)

See Inheritance Tax.

**GRANTOR AND GRANTEE.** See Deed; Easement; Vendor and Vendee.

**GROWING CROPS.** See Mortgage, 1-3.

**GUARANTY.****1. TIME OF COMMENCING ACTION—CONSTRUCTION OF INSTRUMENT.—**

Under the terms of a written guaranty providing that upon the default of the debtor the guarantee may, at its option, proceed directly and "at once" against the guarantors, to collect the full amount of the liability thereunder, or any portion thereof, without first proceeding against the debtor, or foreclosing upon, selling, or otherwise disposing of any collaterals it may have as security for the indebtedness, the right to recover is not lost by the failure to bring the action immediately upon the maturity of the promissory note given to evidence the indebtedness, as the words, "at once," were clearly intended only to emphasize the right intended to be vested by the instrument in the guarantee to proceed against the guarantors as independent obligors. (*Union Trust Company of San Francisco v. Dickinson*, 91.)

**2. PLEADING—CORPORATION INDEBTEDNESS—AUTHORITY TO EXECUTE.—**

**UNNECESSARY ALLEGATION.**—In an action to recover on such a guaranty it is not necessary that the complaint should allege that the execution and delivery of the promissory note, the payment of which the guaranty secured, was authorized by a resolution of the board of directors of the corporation maker, as such question involved an evidentiary fact. (*Id.*)

**GUARANTY (Continued).**

3. **MAKER OF NOTE—UNNECESSARY DEFENDANT.**—In such an action it is not necessary to join the maker of the note as a party defendant, it not being a party to the contract of guaranty. (Id.)
4. **ACCOUNTING—UNNECESSARY CONDITION PRECEDENT.**—It is not necessary that an accounting be first had to ascertain the balance due to the plaintiff, where the transaction involved the mere matter of a loan of a definite sum of money and the payment of a certain sum in part satisfaction thereof. (Id.)
5. **NAMES OF GUARANTORS—OMISSION IN BODY OF INSTRUMENT—VALID GUARANTY.**—A guaranty is not defective because the names of the guarantors do not appear in the body of the instrument, where the name of the guarantee is contained therein, and the names of the guarantors are subscribed at the bottom thereof, and referred to in the body of the instrument as "the undersigned." (Id.)
6. **EVIDENCE—AUTHORITY TO EXECUTE NOTE—MINUTE-BOOK.**—In such an action the minute-book of the corporation is admissible as evidence to show that the promissory note in question was executed by the officers of the corporation by the authority of the latter, duly authenticated by a resolution adopted by the board of directors. (Id.)
7. **EXECUTION AND DELIVERY OF NOTE—DEFECTIVE ALLEGATION.**—An allegation in the answer, in connection with the admission and due delivery of the note, that the defendants have no copy of the note and no recollection of the "words and phrases" of the note as set out in the complaint, and having no other information upon the subject sufficient to enable them to answer said allegations more specifically, and placing their denial upon that ground, deny that the alleged copy of the note set forth in the complaint is a correct copy thereof, is a defective allegation, and tenders no issue. (Id.)
8. **PAYMENT OF RENT RESERVED IN LEASE—CONSTRUCTION.**—A guaranty attached to a lease of real property for the period of ten years at a monthly rental of six hundred dollars for the first five years and seven hundred dollars for the second five years, which indemnifies the lessors for a breach of the covenant to pay the rent reserved "in the sum of thirty-six hundred dollars," and a resolution authorizing the execution of such guaranty by the corporation guarantor, which provides that such guaranty be executed "for the sum of \$3,600, being for six months' rent at \$600 per month," are to be construed as covering only against defaults by the lessees during the first five years, when the rent was six hundred dollars per month. (Rosenthal v. Bauer, 277.)
9. **CONTRACT REPUGNANCIES — HOW INTERPRETED.**—The repugnancies of a contract must be reconciled, if possible, by giving to them such an interpretation as will make them effective and at the same time

**GUARANTY (Continued).**

subordinate to the general intent and purpose of the contract considered and construed in its entirety. (Id.)

10. **INCONSISTENT WORDS AND PHRASES—WHEN REJECTED.**—Particular words and phrases in a contract may, for the sake of interpretation, be rightly rejected only when they are inconsistent with its apparent purpose and the obvious intent of the parties. (Id.)
11. **ACTION FOR RECOVERY OF RENT—EVIDENCE—CIRCUMSTANCES SURROUNDING EXECUTION OF GUARANTY—HARMLESS ERROR.**—In an action brought against the lessees and the guarantor to recover unpaid rent, error, if any, in the ruling sustaining an objection to a question propounded to a witness by plaintiff's counsel, calling for the circumstances attending the execution of the guaranty, was harmless, where subsequently all of the circumstances preceding and attending the execution of the lease, the original guaranty, and the resolution was admitted in evidence without objection. (Id.)

**HABEAS CORPUS.**

1. **JUDGMENT—JURISDICTION OF COURT—ADMISSIBILITY OF RECORDS.**—On a hearing under a writ of *habeas corpus*, the records of the proceedings of the court rendering the judgment, under which the petitioner is held by the sheriff, at the time of pronouncement of judgment, may be considered for the purpose of ascertaining whether the judgment was or was not one which the court had jurisdiction to render against the accused. (Matter of Long, 442.)
2. **OFFICE OF WRIT OF HABEAS CORPUS.**—The single question submitted by a proceeding in *habeas corpus* is always one of jurisdiction, and if it appears that it was within the lawful jurisdiction of the court or tribunal to do the act or pronounce the judgment assailed through such a proceeding, then the inquiry is at an end, even though it be made to appear that the court or the tribunal in doing the act or pronouncing the judgment committed irregularities or errors which, on appeal, might be held sufficient to vitiate the act or judgment. (Id.)
3. **POWER OF COURT TO CORRECT JUDGMENT.**—Where a court has pronounced an illegal judgment, or a judgment illegally, in a case of which it has jurisdiction under the law, such court may thereafter and before execution of such judgment is commenced, set the same aside and pronounce a legal judgment, or a judgment in conformity with the requirements of the law. (Id.)
4. **ILLEGAL SALE OF LIQUOR—JUDGMENT—IRREGULARITY IN—WHEN NOT SUBJECT TO ATTACK ON HABEAS CORPUS.**—A party who has been convicted of selling alcoholic liquors in no-license territory, and first sentenced to imprisonment in the county jail for the term of ninety days and immediately delivered to the custody of the sheriff,

**HABEAS CORPUS (Continued).**

cannot be discharged on *habeas corpus* upon the expiration of such term upon the ground that the day after such judgment was pronounced a second judgment sentencing the defendant to imprisonment in the county jail for the term of five months was rendered, there being no showing that the first judgment was not illegal in substance or form, and it not being shown that a certified copy of the first judgment was furnished to the sheriff under which he held the prisoner. (Id.)

5. **HABEAS CORPUS.**—Prisoner remanded to custody. (In re Johnson, 792.)

See Criminal Law, 30.

**HOMESTEAD.** See Estates of Deceased Persons, 1, 3-5, 9.

**HUSBAND AND WIFE.**

1. **BANK DEPOSITS—PRESUMPTION OF COMMUNITY PROPERTY OVERCOME.**—The presumption that money deposited by a wife in a savings bank during marriage is community property is overcome by evidence tending to show that the money was accumulated from the personal income of the wife's mother and brother, and that the wife merely handled it in her name as their agent or trustee. (Gates v. Cunningham, 319.)
2. **LOAN OF JOINTLY OWNED MONEYS TO THIRD PARTIES—OWNERSHIP OF NOTES AND MORTGAGES—TENANCY IN COMMON.**—Where moneys on deposit in a savings bank under a contract declaring them to be the joint property of a husband and wife are withdrawn by the husband by consent of the wife and loaned to third parties, who gave their notes and mortgages therefor payable to both husband and wife, the wife's interest in such notes and mortgages is that of a tenant in common. (Crowley v. Savings Union Bank and Trust Co., 535.)
3. **CONVEYANCE TO MARRIED WOMAN—EVIDENCE—CODE PRESUMPTION.**—While it is true that the presumption established by section 164 of the Civil Code, that whenever a conveyance is made to a married woman and her husband, she takes the part conveyed to her as tenant in common, is not conclusive, yet it is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony; and whether in any case a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question for the trial court. (Id.)
4. **CONTRACTS—SECTION 158, CIVIL CODE.**—Under section 158 of the Civil Code a husband or wife may enter into any engagement with the other or with any other person respecting property which either might if unmarried. (Roullard v. Gray, 757.)

**HUSBAND AND WIFE (Continued).**

5. **SALE OF AUTOMOBILE TO WIFE—NONLIABILITY OF HUSBAND—EVIDENCE.**—In an action against the husband to recover the balance due on an automobile purchased by his wife, evidence of an offer on the part of the husband to compromise the claim is insufficient to show his liability thereon, there being no delegation of authority by him to his wife to represent him generally or in the particular transaction. (Id.)
6. **AUTOMOBILE NOT NECESSARY OF LIFE—ABSENCE OF AUTHORITY OF WIFE—HEARSAY EVIDENCE.**—An automobile cannot be deemed one of those necessities of life that a wife is authorized to purchase upon her husband's responsibility, and therefore she has no implied authority to represent him in such purchase, and evidence of what she said when she purchased the machine is hearsay and inadmissible against the husband. (Id.)
7. **PLEADING—AMENDMENT—SAME CAUSE OF ACTION.**—Where the original complaint in such an action was founded upon a promissory note given for the balance of the purchase price of the automobile, an amended complaint setting forth a cause of action for goods sold and delivered does not contain a different and new cause of action. (Id.)

See Deed, 6-8; Divorce; Parties.

**IMPERSONATION.** See Criminal Law, §1.

**INFANTS.**

1. **CONTRACTS—DISAFFIRMANCE BY MINOR—RESTORATION OF CONSIDERATION.**—A minor under the age of eighteen years may disaffirm a contract without restoring or offering to restore the consideration. (*Flittner v. Equitable L. A. Soc.*, 209.)
2. **CONTRACT OF LIFE INSURANCE—DISAFFIRMANCE BY MINOR—LAW APPLICABLE.**—A contract of life insurance entered into in this state by a minor under the age of eighteen years is subject to the laws of this state in the matter of the right of such minor to disaffirm the contract and recover the premiums paid thereunder, and not subject to the laws of the state under which the company was organized and exists, notwithstanding the provision in the policy that the payment of the benefits and of the premiums should be at the home office of the company. (Id.)

See Negligence, 11.

**INHERITANCE TAXES.**

1. **INHERITANCE TAX LAW—TRANSFERS IN CONTEMPLATION OF DEATH—POSSESSION OR ENJOYMENT AFTER DEATH—QUESTIONS OF FACT.**—Under the Inheritance Tax Law of 1905 (*Stats.* 1905, p. 341),

**INHERITANCE TAXES (Continued).**

whether transfers of property are made "in contemplation of death," or "intended to take effect in possession or enjoyment after the death" of the donor, are questions of fact. (*Spreckels v. State*, 363.)

1. **MEANING OF PHRASE "IN CONTEMPLATION OF DEATH."**—The phrase "in contemplation of death," as used in the Inheritance Tax Law, relates to transfers made when contemplation of death is the motive which prompts the transfer, and does not have reference to that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life. (*Id.*)
2. **GIFTS OF CORPORATE STOCK BY MOTHER TO CHILDREN—EVIDENCE—TRANSFER NOT IN CONTEMPLATION OF DEATH.**—Under the Inheritance Tax Law gifts of corporate stock made by a mother to her children at a time when she was of the age of seventy-nine years, and suffering from a serious and dangerous heart affliction which caused her death a few weeks after the making of such gifts, are not made "in contemplation of death," and therefore not subject to taxation, where it appears that the donor had often declared her intention of giving the property to the donees *in her lifetime*, and that she at the time of such gifts harbored no thought of immediate death. (*Id.*)

**INJUNCTION.** See Nuisance.

**INSTRUCTIONS.** See Contract, 8; Criminal Law, 9, 11, 14-18, 34, 38-40, 44, 49, 56, 57, 59, 60, 64, 69, 72; Fences, 3; Negligence, 18, 24, 25, 30.

**INSURANCE.**

1. **INTERPRETATION OF LIFE INSURANCE CONTRACTS.**—While the law of the place of performance of an insurance contract governs as to its construction and legal effect, as a general proposition the law of the place where the contract is made controls as to its execution and validity, including the capacity of the parties to make the contract. (*Flittner v. Equitable L. A. Soc.*, 209.)
2. **INSURANCE LAW—APPLICATION FOR ACCIDENT POLICY—FAILURE TO DISCLOSE EYE AFFLICTION—KNOWLEDGE OF AGENT—LIABILITY OF COMPANY.**—An insurance company is not liable upon a policy of accident insurance for an illness of the insured consisting principally of an infection of the eye described as purulent conjunctivitis, where he, in his written application for the policy, stated that he had never suffered any injury to the sight of either eye, and that he had not been disabled by accident or illness during the five years preceding the time of making the application, whereas he had in fact

80 Cal. App.—53

**INSURANCE (Continued).**

suffered an illness of such character and of such seriousness that required the services of a specialist within the five-year period, notwithstanding that the agent of the company, who had only authority to receive and forward the application, countersign and deliver a policy, collect the premium and receive and forward the proofs of claim, was informed of such illness at the time of the signing of the application by the insured. (*Porter v. General Accident, Fire and Life Assurance Corp., Ltd.*, 198.)

3. **AUTHORITY OF INSURANCE AGENTS.**—One who has authority to take applications, receive and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company. (*Id.*)
4. **POWERS OF GENERAL AGENT.**—A general agent, in a strict legal sense, is one who has all the powers of his principal, as to the business in which he is engaged—an extent of authority which is not often conferred in insurance; in that business an agent is termed a general agent rather with reference to geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and subagents which a local agent cannot. (*Id.*)
5. **LIMITATION OF POWERS OF AGENT.**—An insurance company, like any other principal, has authority to limit powers of its agent, and where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes a contract between him and the company and he is charged with knowledge of its terms; among others, the limitations upon the power of the agent of the company. (*Id.*)
6. **WAIVER OF CONDITIONS AND FORFEITURES—AUTHORITY OF AGENT.**—The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties or conditions is not vested in every agent; unless such authority be given to some particular agent to do so, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. (*Id.*)
7. **APPLICATION FOR POLICY—STATEMENTS OF APPLICANT.**—Where the applicant for an insurance policy signs an application certifying to the truth of the statements therein contained material to the risk and delivers it to the company, those statements become his solemn representations; and even though filled out by an agent upon a form furnished by the company, they are (in the absence of fraud) of the same binding force upon the applicant as though he had himself written them out in longhand and signed them. (*Id.*)

**INSURANCE (Continued).**

- 8. FRATERNAL INSURANCE LAW—RIGHT TO DEATH BENEFIT—CONSTRUCTION OF RULES AND REGULATIONS.**—Where the rules and regulations of an international labor organization, and of the local union to whose general laws it is subject, upon the subject of dues, delinquencies, and suspensions from membership, provide that members shall not be in arrears until three months' dues are owing, when they shall be suspended, and that the secretary shall notify all members when thus delinquent, and that the local union shall keep members in good standing until suspended, it is necessary in order to deprive such a member of that good standing in his local union which would debar his widow or other beneficiary of the right to receive the death benefit upon his decease, that affirmative action amounting to suspension shall be taken by the local union of which he was a member, and, in the absence of such action, he is entitled to be reported as a member in good standing, and entitled to have the death benefit paid upon his death to his widow or other beneficiary. (*Wilson v. District Council of Sheet Metal Workers*, 190.)
- 9. FRATERNAL INSURANCE LAW—ACTION ON POLICY—STATUTE OF LIMITATIONS.**—Under the terms of a fraternal life insurance policy providing that whenever any competent court having jurisdiction at the last known domicile of an insured member shall render judgment to the effect that the member has not been seen or heard from during a period of seven consecutive years prior to the date of the judgment, the same shall be presumptive proof of his death, and his benefit certificate shall at once become due and payable as if he were really proven dead, the beneficiaries of the insured are entitled to await the termination of the seven-year period before commencing an action on the policy, and the statute of limitations does not run against such an action until the expiration of such period. (*Linne-weber v. Supreme Council Catholic Knights of America*, 315.)
- 10. PLEADING AND EVIDENCE—RIGHT TO MAINTAIN ACTION—CHILDREN OF DECEASED BENEFICIARY.**—Where a policy of insurance is made payable to a designated person or, in case of his death, to his children, and such person has died prior to the commencement of an action to recover on the policy, it is not necessary for them to either plead or prove that there had been a probate of their father's estate, but such issue should be tendered by the defendant. (*Id.*)
- 11. ACCIDENT INSURANCE LAW—CONSTRUCTION OF POLICY.**—The clause in a policy of insurance providing indemnity for loss of life, limb, sight, or time by accidental means, and loss of time by sickness to the extent therein provided, which provides that "if such bodily injury alone shall, directly and independently of all other causes, immediately, continuously, and totally disable and prevent the insured from performing any and every kind of duty pertaining to his business or occupation, and if during the period of such continuous and total disability shall result in any one of the losses specified

**INSURANCE (Continued).**

in Part I hereof, the company will pay the sum specified for such loss, and in addition will pay the weekly indemnity as provided in Part II from the date of the accident to the date of such loss," does not limit the liability of the company to cases where the accident was so severe as to "immediately and continuously" disable and prevent the insured from performing the duties pertaining to his business or occupation, but such clause is intended to provide for two modes of indemnity to injured policy-holders: one, the payment of a stipulated sum for the loss of a member; the other an indemnity in the form of weekly benefits to be paid the injured person during the period of his inability to attend to his business or occupation resulting from the injury, and extending from the date of such injury to the date of the loss of the injured member. (*Claxton v. American Casualty Co.*, 457.)

12. **FIRE INSURANCE—PAROL CONTRACT—VALIDITY OF.**—Where an insurance agent authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy. (*Ferrar v. Western Assur. Co.*, 489.)
13. **AGENCY TO PROCURE INSURANCE—EVIDENCE—SCOPE OF AUTHORITY.**—Where a soliciting insurance agent is in the first instance given authority to place insurances, and such authority is thereafter extended to keeping the property insured from year to year, he thereby becomes the general agent of the insured with authority to insure the property and to keep it insured, and, as an incident thereto, to accept notice of cancellation of a policy and procure insurance in another company. (*Id.*)
14. **INSURANCE LAW—APPOINTMENT OF LOCAL AGENT—SCOPE OF AUTHORITY—CONSTRUCTION OF INSTRUMENT.**—A local agent of an insurance company has no authority to make a binding contract of insurance under a letter of the general manager appointing him as agent for the transaction of insurance in a stated locality subject to such instructions as may from time to time be given him by the home office, and providing therein that "policies will be written at the general office." (*Browne v. Commercial Union Assur. Co. of London*, 547.)
15. **GENERAL AND LOCAL AGENTS—DISTINGUISHING FEATURE.**—The authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts, and consequently cannot bind their principals by anything they may say or do during preliminary negotiations. (*Id.*)
16. **AUTOMOBILE INSURANCE—MISTAKE IN APPLICATION—RETENTION OF POLICY AFTER KNOWLEDGE—ESTOPPEL.**—A holder of a policy of

**INSURANCE (Continued).**

automobile insurance, who upon discovery of a mistake made by him and the local agent of the insurance company in attaching the wrong "rider" to his application for the policy, which they both believed covered risks against collisions, elects to retain the policy issued to him, and neither requests the issuance of a different policy, nor offers to pay the premium requisite to insure against the risk which he believed the rider to cover, thereby accepts the policy, and cannot in the case of a collision ask for reformation of the policy and judgment for damages from the collision. (Id.)

See Criminal Law, 80; Infants.

**INTEREST.** See Pawnbroker.

**INTOXICATING LIQUORS.**

1. **LOCAL OPTION ACT—FURNISHING OF ALCOHOLIC LIQUORS IN NO-LICENSE TERRITORY—SUFFICIENCY OF TITLE OF ACT.**—The act of 1889, entitled "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option, . . . making it a public offense to sell, give away or distribute alcoholic liquors within such territory [no-license territory], with certain exceptions, and providing penalties for such offenses," is sufficiently comprehensive and accurate to warrant the provision in the body of the act, making it unlawful to "furnish" liquor within no-license territory. (People v. Joe Joy, 36.)
2. **OBJECT OF CONSTITUTIONAL PROVISION.**—The object of the constitutional provision requiring every act to embrace but one subject, which shall be expressed in its title, is to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title of another; and it must receive a reasonable, and not a narrow or technical, construction. (Id.)
3. **FURNISHING AND GIVING AWAY LIQUOR IN NO-LICENSE TERRITORY—SUFFICIENCY OF INFORMATION.**—An information charging a defendant with the offense of unlawfully "furnishing, distributing and giving away" alcoholic liquors in no-license territory is not defective in and to the extent that it contains the word "furnish," and where the evidence shows that the defendant "gave" the liquor away, the use of the word "furnish" may be disregarded as involving nothing more than mere abstract error, if error at all. (Id.)

See Habeas Corpus; Municipal Corporations, 3.

**IRRIGATION DISTRICT.**

1. **IRRIGATION ACT—CERTIFICATE OF SALE AND DEED—ERRONEOUS REPORTAL OF NAME OF PERSON ASSESSED—VOID DEED.**—A certificate of sale and a tax deed made pursuant to proceedings had under the

## IRRIGATION DISTRICT (Continued).

Irrigation Act of 1897 (Stats. 1897, p. 254) are both invalid under the provision of section 35 requiring the assessment-book to specify the name of the person assessed, section 45 requiring the certificate of sale to state the name of the person assessed, and section 48 requiring that "the matter recited in the certificate of sale must be recited in the deed," where the name of the person assessed appeared on the assessment-book as "D. Bruschie," and in the certificate and sale as "D. Bruscia." (*Bruschi v. Cooper*, 682.)

2. **NAME OF PERSON ASSESSED—RECITAL IN DEED.**—The provision of section 48 of the Irrigation Act that "the matter recited in the certificate of sale must be recited in the deed" includes the "matter" that the deed shall contain the name of the person assessed, when known. (*Id.*)
3. **TAX DEED AS CONCLUSIVE EVIDENCE—POWER OF LEGISLATURE.**—While the legislature can make a certificate of sale or tax deed conclusive as to matters which are in their nature nonessentials, it has not the power to make such documents conclusive as to any of the essentials of listing, valuation, apportionment or notice. (*Id.*)
4. **TAXATION—LISTING OF LAND FOR ASSESSMENT—STATEMENT OF NAME OF OWNER.**—The listing of land for assessment necessarily means that the name of the owner, if known, and a description of the property assessed must be "*correctly stated.*" (*Id.*)
5. **TAX DEED AS CONCLUSIVE EVIDENCE—PROCEEDINGS INCLUDED.**—The provision of section 48 of the Irrigation Act making the tax deed conclusive evidence of the regularity of all the proceedings from the assessment to the deed means all the proceedings other than those as to which the deed by said section is made *prima facie* evidence. (*Id.*)
6. **DATE OF SALE—MISRECITAL IN CERTIFICATE—EFFECT OF.**—Under section 45 of the irrigation law providing that the collector must make out in duplicate a certificate dated on the day of sale stating (when known) the name of the person assessed and the time when the purchaser will be entitled to a deed, a certificate of sale dated March 8, 1906, instead of February 20, 1906, the day of sale, is not void, where it is stated therein that the property may be redeemed within twelve months from the former date, which is stated as the date of sale. (*Id.*)

## JOINT TENANTS.

1. **SAVINGS BANK DEPOSIT—CONSTRUCTION OF WRITING.**—A writing signed by a husband and wife at the time of the deposit of a sum of money by them in a savings bank, which provides that all moneys then on deposit, or at any time thereafter deposited by them, should be their joint property, with right of survivorship, and that such moneys were payable to either, or to the survivor, without

**JOINT TENANTS (Continued).**

reference to the original ownership of such moneys, constitutes a joint tenancy as to the fund with right of survivorship, and, at the death of either, the ownership of the deposit passes to the survivor. (*Crowley v. Savings Union Bank and Trust Co.*, 144.)

**2. RECOVERY OF DEPOSIT—EVIDENCE—DECLARATIONS OF TESTATOR.—**

In an action by the surviving wife to recover the balance of such a deposit on hand at the death of her husband, the subsequent will of the deceased wherein he declared that all his property was separate property, and wherein he directed "that all moneys, bank accounts, stocks, bonds, and other securities now in the joint name or joint custody of myself and wife, constitute a part of my said separate estate and are to be administered upon by my said executor pursuant to the terms of this will," is inadmissible as evidence of an intention other than that expressed in the writing accompanying the deposit. (*Id.*)

**3. TRANSFER OF SAVINGS BANK ACCOUNT—RIGHT OF SURVIVORSHIP.—**

Where a depositor of money in a savings bank, while ill, and about a month previous to her death, executes and delivers to her niece, for whom she had great affection and regard, a writing directing the bank to transfer the account to an account in the names of herself or such niece, "payable to either or the survivor," and accompanies such delivery with the pass-book, and on the following day the bank upon presentation of such document and the pass-book makes a transfer of the account as directed, and issues a new pass-book which the aunt directs the niece to keep, and on the same day the niece makes a withdrawal from such account for her own personal use, with the knowledge and concurrence of the aunt, such writing, and the acts and conduct of the parties at the time of and after its execution, constitute the parties joint tenants of the fund with the right of survivorship in the niece upon the death of the donor. (*McCarthy v. Holland*, 495.)

**JUDGE.** See Criminal Law, 36.

**JUDGMENT.**

- 1. WHEN VOID.—**A judgment is only void when, upon an inspection of the judgment-roll, it appears that the court either did not have or has exceeded its jurisdiction. (*California Central Creameries Co. v. Crescent City etc. Co.*, 619.)
- 2. JUDGMENT BY DEFAULT—ORDER SETTING ASIDE—VERBAL STIPULATION—SUFFICIENCY OF EVIDENCE.—**On a motion to set aside the default of a defendant and vacate a judgment entered thereon, where the trial court found that an oral stipulation had been entered into between the defendant and one of the attorneys for the plaintiff, since deceased, to the effect that it would not be necessary for said defendant to appear in the action and that no judgment

**JUDGMENT (Continued).**

would be taken against him, and that for a period of more than six years thereafter, during which time the defendant had made no appearance, relying upon such stipulation, no default was entered and no judgment taken, but after the lapse of said time defendant's default was taken and judgment entered against him, and he immediately after discovering the fact and within a few days after the entry of the judgment made said motion, there was no abuse of discretion on the part of the trial court in granting the motion. (*MacGillivray v. Owen*, 763.)

3. **VERBAL STIPULATIONS—RULE.**—While it is true that the courts have early and often applied the rule that verbal stipulations as to pleadings and evidence will not ordinarily be regarded and enforced in the courts except when admitted by the parties against whom they are invoked, the courts have been indisposed to give this otherwise general rule application to default judgments, and in such cases they have allowed the trial court a wide discretion in determining whether or not the defendants should not be relieved from such default and allowed to defend upon the merits. (*Id.*)

See Appeal, 2, 7; Claim and Delivery, 2, 3; Divorce, 2; Estates of Deceased Persons, 3, 8; Execution, 1; Findings; Habeas Corpus; Justice's Court, 1-3; Office and Officers, 14, 16; Partnership, 4; San Francisco Stock and Exchange Board, 8.

**JUDICIAL NOTICE.**

**FLOW IN OTHER WELLS.**—Judicial notice cannot be taken that the flow of water in one well is evidence of a like flow in another well of different depth a mile or so distant. (*Fairbanks, Morse & Co. v. Zimmerman*, 81.)

**JURISDICTION.** See Criminal Law, 23; Divorces; Election, 1, 2; Estates of Deceased Persons, 3, 8; Habeas Corpus; Judgment, 1; Justice's Court, 4, 8, 10-12; Juvenile Court; New Trial; Nuisance, 1; Pleading.

**JURY AND JURORS.** See Eminent Domain, 3-6.

**JUSTICE'S COURT.**

1. **FEES—CONSTRUCTION OF SECTION 4300<sup>1/2</sup>, POLITICAL CODE.**—By section 4300<sup>1/2</sup> of the Political Code, the legislature has, for the purpose of fixing the fees of a justice of the peace, classified the services which may be rendered into three groups, as to each of which a specific fee is fixed for services performed; that is, two dollars is required to be paid for all services performed by him before trial; if there be a trial, an additional three dollars shall be paid; if there be no trial, and the justice be called upon to render and enter judgment by default, an additional fee of two

**JUSTICE'S COURT (Continued).**

dollars shall be paid covering such services; and it is a prerequisite to the rendition and entry of a judgment of default to exact the payment of a fee of two dollars, which covers the cost, not only of the rendition and entry of such judgment, but also services subsequent thereto, including the issuance of an execution and satisfaction of judgment. (*Austin v. Strang*, 265.)

2. **APPLICATION TO SET ASIDE JUDGMENT BY DEFAULT—TIME.**—The time to file an application under section 859 of the Code of Civil Procedure to be relieved from a judgment entered by default in a justice's court, on the ground that such judgment had been taken by mistake, inadvertence, surprise and excusable neglect, begins to run from service of written notice of entry of the judgment as required by section 898 of the Code of Civil Procedure, as amended in 1915. (*Peterson v. Superior Court*, 466.)
3. **PREPARATION OF AFFIDAVITS—NOTICE OF ENTRY OF JUDGMENT NOT WAIVED.**—Service of written notice of the entry of such a judgment is not waived by the mere preparation of affidavits to be used upon the application to be relieved therefrom. (*Id.*)
4. **VENUE—SERVICE OF SUMMONS OUTSIDE COUNTY—JURISDICTION.**—In an action to recover for services, where it appears by the complaint and is nowhere denied that the obligation sued on was incurred in the township and county where the action was brought, that the defendants, at the time the obligation was incurred, resided in said township and county, and (by necessary inference), if they resided in another county at the time the action was brought, departed from said township and county after the obligation was incurred, that there was no special or other agreement in writing that the obligation was to be performed in any other place than in the township and county where it was incurred, under section 832 of the Code of Civil Procedure the court acquired jurisdiction of the action, and under section 848 of the same code service of summons outside the county in which the action was brought was properly made. (*Roberts v. Superior Court*, 714.)
5. **MOTION TO DISMISS COMPLAINT—EFFECT OF.**—A motion to dismiss a complaint on the ground that the court is without jurisdiction of the subject matter of the action is substantially, or in legal effect, a demurrer to the complaint on that ground, or necessarily calls for relief which may be demanded only by a party to the record. (*Id.*)
6. **GENERAL APPEARANCE—WHAT CONSTITUTES.**—In such a case, where the defendants appeared in the action and made a motion not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction "over the persons of the defendants and the subject matter of the litigation," their appearance was a general appearance, and they thereby submitted themselves to the jurisdiction of the court. (*Id.*)

## JUSTICE'S COURT (Continued).

7. **APPEARANCE — NATURE OF — RELIEF SOUGHT CONTROLS.**—Where a party appears and asks for such relief, although expressly characterizing his appearance as special, and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material. (Id.)
8. **LACK OF JURISDICTION OF PERSON—PLEA IN ABATEMENT.**—Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement and find no special favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. Such a plea is purely a dilatory one, and when a defendant seeks to avail himself of it, he must stand upon his naked legal right and seek nothing further from the court than the enforcement of that right, and if he asks further relief, he waives the irregularity of his summons. (Id.)
9. **JUSTICE'S COURT APPEAL—AFFIRMANCE OF JUDGMENT BY SUPERIOR COURT — REVIEW OF JUDGMENT OF JUSTICE'S COURT IN DISTRICT COURT OF APPEAL.**—A judgment of a justice's court cannot be reviewed on *certiorari* in the district court of appeal, where an appeal has been taken from such judgment to the superior court and the judgment affirmed. (Albers v. Superior Court, 772.)
10. **APPEALS IN CRIMINAL ACTIONS—JURISDICTION OF SUPERIOR COURTS — GROUNDS OF IMPEACHMENT.**—In view of the fact that the law authorizes appeals to the superior courts in criminal cases of which the justices' and police courts are by law invested with jurisdiction, the only ground upon which the jurisdiction of the superior court may legally be impeached and denied in any such case is either that the case is one of which the justices' courts have no jurisdiction, and in which, therefore, they have no power or authority to enter a valid or any judgment, or that the justice's court, while having jurisdiction of the offense, in some way acted beyond its jurisdiction in entering its judgment, or that the superior court had failed to acquire jurisdiction of the appeal because, in taking the appeal or attempting to do so, there had been a failure to observe some vital and necessary rule of practice or procedure in the matter of taking appeals to such courts. (Id.)
11. **AMENDMENT OF COMPLAINT—ADDITION OF SECOND COUNT—PROCEEDINGS IN JUSTICE'S COURT — JURISDICTION OF APPEAL.**—The superior court is not without jurisdiction to hear and determine an appeal taken from a judgment of a justice's court convicting a defendant of violating the state law making it a misdemeanor to drive an automobile over a highway in excess of the speed pre-

**JUSTICE'S COURT (Continued).**

scribed by law, by reason of the fact that the justice's court improperly allowed the dismissal of two complaints for the purpose of amending the same, and that the complaint upon which the defendant was convicted was faulty, because it stated the offense in two separate and distinct counts. (Id.)

- 12. FAILURE TO BRING ACTION TO TRIAL WITHIN SIXTY DAYS—JURISDICTION OF JUSTICES' COURTS—CONSTRUCTION OF CODE.**—Jurisdiction of a justice's court of such an offense is not lost by reason of the failure to bring the case to trial within sixty days after the filing of the original complaint, as section 1382 of the Penal Code, providing for the dismissal of criminal actions not brought to trial within sixty days after the filing of the indictment or information, has no application to the trial of low-grade misdemeanors cognizable in justices' and police courts. (Id.)

See Appeal, 1, 5, 6.

**JUVENILE COURT.**

**JUVENILE COURT LAW—JURISDICTION—CONSTITUTIONAL LAW.**—Under the terms of the Juvenile Act, as its text stood both in the year 1909 (Stats. 1909, p. 213) and as amended in 1915 (Stats. 1915, p. 1225), the juvenile court is given jurisdiction over all "persons" under the age of twenty-one years, irrespective of their minority; and there is no constitutional restriction which deprives the legislature of the right to confer jurisdiction upon the juvenile court in the manner and form described by the act. (In re Willis, 188.)

**KIDNAPING.** See Criminal Law, 32-34.

**LANDLORD AND TENANT.** See Taxation, 1.

**LARCENY.** See Criminal Law, 35-47.

**LEASE.** See Guaranty, 8-11; Specific Performance.

**LIBEL.**

- 1. PUBLICATION CONCERNING DIVORCE ACTION—ACCUSATION OF "AFFINITY"—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in an action for libel based upon the publication of an article in a newspaper having reference to a divorce action, which alleges that it was stated in such article that the husband in his complaint in such action accused his wife of having two affinities, of which the plaintiff was one, and which statement is alleged to be false, states a cause of action, and is not a fair and true report, without malice, of a judicial proceeding. (Riley v. Evening Post Pub. Co., 294.)

**LIBEL (Continued).**

2. **PLEA OF PRIVILEGE—DEMURRER.**—In actions for libel the plea of privilege is defensive matter which cannot be raised on demurrer unless the complaint affirmatively shows that the report complained of as libelous is a fair and true report, without malice, of a judicial proceeding. (Id.)

See Criminal Law, 43.

**LIEN.** See Lodging-house; Mechanics' Liens; Mortgage; Street Assessment.

**LIFE ESTATE.** See Deed, 6-8.

**LIMITATION OF ACTIONS.** See Statute of Limitations.

**LIS PENDENS.** See Deed, 5.

**LOCAL OPTION.** See Election; Intoxicating Liquors.

**LODGING-HOUSE.**

1. **WHAT CONSTITUTES.**—Where a house is under the direct control and supervision of the owners, rooms are furnished and attended to by them, and they or their servants retain the keys thereto, a person renting such a room makes himself a lodger and not a tenant, and the owners are lodging-house keepers, within the meaning of section 1861 of the Civil Code, giving such a person a lien as security for unpaid rent. (Fox v. Windemere Hotel Apartment Co., 162.)
2. **CLAIM AND DELIVERY—TRUNK AND CONTENTS HELD FOR UNPAID RENT—TENDER—MATERIAL ISSUE—FINDINGS.**—In an action of claim and delivery to recover a certain trunk and its contents by one claiming to be the owner, in which action defendants claim a lien under section 1861 of the Civil Code to secure unpaid rent, whether or not a legal tender of the amount alleged to be due was made, is a material issue upon which a finding should be made. (Id.)

**LOS ANGELES, COUNTY OF.** See Fences; Office and Officers, 8.

**MANDAMUS.** See Costs; Taxation, 2-4

**MAP.** See Broker, 2-3.

**MARRIED WOMEN.** See Husband and Wife; Parties.

**MASTER AND SERVANT.** See Negligence, 12-17, 19, 22-24; Workmen's Compensation Act.

**MAYHEM.** See Criminal Law, 49-51.

**MEASURE OF DAMAGES.** See Damages.

**MECHANICS' LIENS.**

1. **BUILDING CONTRACT—ABANDONMENT BY CONTRACTOR—AMOUNT APPLICABLE TO LIENS—RULE PRIOR TO CODE AMENDMENT.**—Where a building contract had been abandoned by the contractor prior to completion of the work, the portion of the contract price applicable to the liens of other persons than the contractor was, prior to the repeal of section 1200 of the Code of Civil Procedure in the year 1911, the difference between payments made to the contractor and the value of the work and materials done and furnished at the time of such abandonment, including materials then actually delivered on the ground, "estimated as near as may be by the standard of the whole contract price," and not by the actual value of such work and materials. (*Olson-Mahoney Lumber Co. v. Dunne Investment Co.*, 332.)
2. **TIME OF FILING LIEN—CESSATION OF LABOR—PLEADING AND EVIDENCE.**—Where in an action for the foreclosure of a mechanic's lien, it is alleged in the complaint that there had been a cessation of labor for a period of thirty days, which, if true, would have shown that the lien was filed too late, and it appears from the evidence introduced without objection, and the admissions of the answer to the complaint that there had not been such a cessation, and also that no notice of cessation had ever been filed of record, the averment of the complaint may be disregarded and the finding of the court upon the evidence accepted. (*Id.*)
3. **PLEADING—OMISSION TO ALLEGE TERMS OF CONTRACT—EVIDENCE OF LIEN—EFFECT OF.**—An objection that the complaint in an action to foreclose a mechanic's lien failed to allege that the lien contained a statement of the terms, time given, and conditions of the contract, cannot be considered on an appeal from the judgment, where no demurrer was interposed to the complaint and the lien, which contained such statement, was admitted in evidence without objection. (*Id.*)
4. **COMPLAINT AND LIEN—LACK OF VARIANCE.**—There is no variance between the complaint in an action to foreclose a mechanic's lien and the lien itself, sufficient to justify a reversal of the judgment, where it is alleged in the complaint that the contractors agreed to "pay the plaintiff the reasonable value of the material [lumber and mill work] in cash and upon delivery," and the lien recited that the agreement was that the materials were to be paid for upon delivery in accordance with the prices carried out against the various items, and that the materials were of the reasonable value as in the notice set forth. (*Id.*)

**MECHANICS' LIENS (Continued).**

6. **LUMBER USED FOR "CONCRETE FORMS"—RIGHT TO LIEN.**—Lumber furnished to be used for "concrete forms" which did not enter into or become a part of the building, is lienable, where it is shown that the building could not have been erected without the use of lumber made into such forms into which the concrete was poured, there to remain until thoroughly "set" for fifteen or twenty days. (Id.)
6. **CESSEMENT OF WORK AND COMPLETION OF BUILDING—CONTRADICTORY AVERTMENTS—EFFECT OF ANSWER.**—Contradictory averments in or statements not true in the complaint, as to cessation of work and completion thereof by the contractor, when at variance with the findings, are not fatal to recovery, where the answer cures the contradiction of misstatements, and the findings are as alleged in the answer and supported by uncontradicted evidence. (Id.)
7. **ORDER CONSOLIDATING ACTIONS — EFFECT UPON DEFECTIVE PLEADINGS.**—Where actions for the foreclosure of mechanic's liens are consolidated, the effect of the order of consolidation is to unite the causes of action so as to constitute one cause of action and one pleading, and the allegations in one complaint will remedy defects and supply omissions in another. (Id.)

**MEDICAL ACT.** See Physician and Surgeon.

**MINORS.** See Infants.

**MISTAKE.** See Insurance, 16.

**MORTGAGE.**

1. **MORTGAGE ON GROWING CROPS—DELIVERY TO PACKING ASSOCIATION—VIOLATION OF AGREEMENT—LIEN NOT LOST.**—The lien of a mortgage on a crop of grapes is not lost by the delivery of the crop to a packing-house for marketing by the mortgagor in his own name in violation of an agreement between the mortgagor and mortgagee that the crop should be delivered in the name of the mortgagee, as under such an agreement the mortgagor is constituted the agent of the mortgagee. (*Crosby v. Fresno Fruit Growers' Co.*, 308.)
2. **REMOVAL OF CROP INDEPENDENT OF AGREEMENT—LIEN NOT LOST—STATUS OF CONSIGNEE OF MORTGAGOR.**—The lien of a mortgage on a growing crop is not lost by the wrongful removal of the crop from the land, independent of any agreement, and such lien still exists against the consignee of the mortgagor, unless he can clothe himself with the character of an innocent purchaser for value. (Id.)
3. **RECOVERY OF PROCEEDS OF CROP—PLEADING—EXECUTION OF MORTGAGE—DENIAL UPON INFORMATION AND BELIEF.**—In an action by the mortgagee against the consignee of the mortgagor to recover the proceeds of such crop, a denial upon information and belief of the an-

**MORTGAGE (Continued).**

ention of the mortgage sufficiently raises the issue, notwithstanding the defendant had constructive notice of its recordation. (Id.)

4. **FORECLOSURE OF MORTGAGE—FALSE REPRESENTATIONS—EVIDENCE—AGENCY.**—In an action to foreclose a mortgage securing three promissory notes given as part consideration on an agreement for the exchange of lands, where the defendants pleaded that they were induced to execute the notes and mortgage by false representations made to them by a party negotiating the exchange, evidence as to the alleged fraud was inadmissible in the absence of a foundation showing that the relation of principal and agent existed between plaintiff's assignor and the one claimed to have made the false representations, or, in support of the theory of ratification, that the plaintiff's assignor accepted the fruits of the transaction with knowledge of these material facts. The mere acceptance of the fruits of the transaction does not constitute ratification, nor is such acceptance, standing alone, any evidence of ratification. (Huffman v. Knapp, 759.)

See Criminal Law, 35-42.

**MUNICIPAL CORPORATIONS.**

1. **REPEAL OF LIQUOR ORDINANCE—FILING OF REFERENDUM PETITION—SUSPENSION OF ORDINANCE—CONSTRUCTION OF SAN DIEGO CHARTER.**—An ordinance of the city of San Diego repealing an ordinance making it unlawful for any person to engage in retailing intoxicating liquors outside of a designated portion of the city is suspended under the charter provisions of such city by the filing of a referendum petition against the repealing ordinance within thirty days after its passage. (Bigdon v. Common Council of City of San Diego, 107.)
2. **RESOLUTION AWARDED LIQUOR LICENSE—QUASI-JUDICIAL FUNCTION.** Under the charter of the city of San Diego, a resolution of the common council awarding a liquor license is a quasi-judicial proceeding, and therefore reviewable on *certiorari*. (Id.)
3. **LIQUOR ORDINANCES—REPEAL BY IMPLICATION.**—A municipal ordinance adopted for the direct purpose of marking out the boundaries of the zone outside of which there should be no retail liquor establishments allowed, is not repealed by implication by the adoption of an ordinance which, in its plain import, was designed to regulate the granting of licenses within the zone where liquor-dealing establishments were permitted. (Id.)
4. **CITY OF OAKLAND—AWARD OF CONTRACT FOR JAIL IN CITY HALL—DISCRETION OF CITY COUNCIL—CONSTRUCTION OF CHARTER.**—The city council of the city of Oakland, under the provisions of sections 126 and 130 of its charter, has a discretion in awarding a contract for the construction of a jail in its city hall to the "lowest responsible

**MUNICIPAL CORPORATIONS (Continued).**

- bidder," to consider the quality of the respective locking devices upon which the various bids were predicated, and is not required to award the contract to the lowest responsible bidder subject to the only limitation that such bidder shall not have been "delinquent or unfaithful in any former contract with the city." (*West v. City of Oakland*, 556.)
5. **MEANING OF TERM "LOWEST RESPONSIBLE BIDDER"—DISCRETION OF COUNCIL.**—The term "lowest responsible bidder" means the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work; and, where by the use of these terms the council has been invested with discretionary powers as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts in the absence of direct averments and proof of fraud. (*Id.*)
6. **INVESTIGATION OF JAIL-LOCKING DEVICES—CO-OPERATION OF UNSUCCESSFUL BIDDER—LACK OF AUTHORITY OF COUNCIL NOT SUBJECT TO QUESTION.**—An unsuccessful bidder for the installing and furnishing of a jail in a city hall cannot complain that the municipal board had no authority to make investigations into the merits of the locking devices submitted by the various bidders on the ground that the plans and specifications did not call for or require the submission of models of devices, nor provide for comparison of the respective devices, where such bidder co-operated with the board in making such comparisons and investigations to the extent of exhibiting before the board a working model of its particular device, and of suggesting the names of cities where experts might observe jails where such device was in actual operation. (*Id.*)
7. **AWARD OF BID—SPECIFIC FINDING NOT REQUIRED.**—It is not necessary for a municipal board in making a record of its action in the rejection of bids to also make an entry of its reason for so doing, but the real reason may be shown upon the trial of the case involving the integrity and action of the board. (*Id.*)
8. **MUNICIPALITIES—CONTROL OF STREETS—PERMITS FOR MOVING BUILDINGS—VALIDITY OF ORDINANCE.**—The city of Alameda by its charter is given authority as a municipal corporation to "manage and control the streets, roads and highways, and to permit, regulate or prohibit the placing of obstructions thereon, and to ordain, make and enforce within the limits of the city all necessary police, sanitary and other laws and regulations (Stats. 1906-7, p. 1059; Const., art. XI, sec. 2)"; and under this grant of power the city has the right to pass an ordinance providing for the issuance of a permit to move a building over the streets of the city upon written application showing the consent of certain property owners, the filing of a bond, and the character of building to be removed, and pro-

**MUNICIPAL CORPORATIONS (Continued).**

hibiting such removal in the absence of the required permission. (*Robinson v. Otis*, 769.)

9. **DISCRETION IN GRANTING OR REFUSING PERMIT.**—The governing body of a municipality has a certain discretion in the granting or refusing of a permit for the moving of a building over the streets, and its conclusion on the subject, in the absence of fraud or circumstances disclosing a manifest abuse of such discretion, is conclusive and not open to question by the courts. (*Id.*)

See *Certiorari*; *County*; *Election*, 5; *Irrigation District*; *Negligence*, 19; *Office and Officers*; *Street Assessment*.

**MURDER AND MANSLAUGHTER. See Criminal Law, 52-60.**

**NEGLIGENCE.**

1. **ACTION FOR LOSS OF SIGHT OF EYE—EVIDENCE.**—In an action for damages for the loss of the sight of an eye caused by the penetration of a chip of steel, through the alleged negligence of the defendant, it was not prejudicial error to refuse to allow, upon cross-examination of an oculist, who had attended the plaintiff for several weeks and was testifying upon his behalf, questions as to whether the injury would interfere with the labor activity of an ordinary laboring man, or would interfere with his work as a factory man, or such work as plaintiff was doing, chipping steel with a sledge-hammer, or whether plaintiff would be able to see a chart used by the optician with figures upon it, where the witness had testified that he had made physical tests of the plaintiff, but not with these charts, and he had told the jury what tests he had made and the extent of the injuries—the jury then being in as good position as the witness to know to what extent the injury to the plaintiff's eye impaired his ability to earn a livelihood. (*Coelho v. Judson Mfg. Co.*, 39.)
2. **OMISSION TO FIND IN EXPRESS TERMS—SUFFICIENCY OF.**—In an action to recover damages for personal injuries based on negligence, the omission to find in express terms that the defendant was negligent will not defeat the judgment, if the facts found show an omission of duty with a resultant injury. (*Cooley v. Brunswick Drug Co.*, 58.)
3. **FINDING OF JURY—WHEN CONCLUSIVE.**—Negligence is a relative term depending upon inferences to be drawn from many facts and circumstances which it is the province of the jury to draw in each particular case, and when they do so find upon facts as to which reasonable minds might differ in the conclusion reached, their decision is not subject to review on appeal. (*Id.*)
4. **INJURIES TO DRUG CLERK—JUDGMENT SUPPORTED BY FINDINGS.**—In an action for damages for personal injuries sustained by a receiving

**NEGLIGENCE (Continued).**

clerk of a wholesale drug company from coming violently in contact with a closed fire-door while rapidly ascending a stairway in the building of the defendant, it cannot be said, as a matter of law, that the findings do not support the judgment in favor of the plaintiff, on the theory that the plaintiff was himself negligent in failing to look up and see whether the door was open or closed, where it is shown by the evidence that he, in the discharge of the duties of his employment, used such stairway many times a day, and that he had been doing so for a period of several years, and that the door had never before, to his knowledge, been closed during business hours. (Id.)

5. **INJURY TO PERSON ON SIDEWALK—FALL OF PAINTER'S TRESTLE—LIABILITY OF OWNER OF BUILDING.**—The owner of a building in course of construction is liable in damages for injuries received by a person standing on the sidewalk in front of, and several feet distant from, the line of the building from the falling upon him of a painter's trestle while the trestle was being moved by several men who were delegated for that purpose by the contractor doing the general work of the building, where, under the terms of the contract between the painter and the owner, the latter was not only to provide the trestles, but to take care of the moving thereof, and it is not shown that the persons who moved the trestle were, as to such owner, independent contractors. (Gordon v. Roberts, 76.)
6. **EVIDENCE—FALLING OF TRESTLE—PRIMA FACIE CASE OF NEGLIGENCE.**—In an action to recover damages for such injuries it is not necessary that the particular act, thing, or motion which caused the trestle to fall should be illustrated by direct evidence, as the mere fact of the falling of the trestle upon the plaintiff makes a *prima facie* case of negligence on the part of the person or persons responsible for the falling thereof. (Id.)
7. **EVIDENCE—MUNICIPAL ORDINANCE—BARRICADE OVER SIDEWALK.**—In such an action it is not error to admit in evidence an ordinance of the municipality which required that a barricade be erected with a canopy over the sidewalk where building work was in progress. (Id.)
8. **DESTRUCTION OF AUTOMOBILE BY FIRE—SUFFICIENCY OF EVIDENCE.**—In this action for damages for the destruction of an automobile by fire, through the defendant's negligence, while on storage in a warehouse located along the line of and adjacent to the right of way and railroad tracks of the defendant, it is held that the undisputed facts were sufficient to give rise to an inference of negligence on the part of the defendant's employees in not properly extinguishing the fires which they had set along such right of way in the vicinity of the warehouse to burn off the grass, and that such

**NEGLIGENCE (Continued).**

facts were also sufficient to justify the finding that the fire in question came from the defendant's tracks and was the result of the negligent acts of its employees. (*St. Paul Fire and Marine Ins. Co. v. Southern Pacific Co.*, 140.)

9. **EVIDENCE—ORIGIN OF FIRE—OPINION OF FIRE CHIEF.**—In such an action it is error to permit the chief of the fire department to give his opinion as an expert witness respecting the origin of the fire, as such question is one for the court or jury, but the admission of such evidence is not prejudicially erroneous where the facts upon which the opinion was based had already been presented in evidence. (*Id.*)
10. **DAMAGE TO MOTOR TRUCK—COLLISION WITH AUTOMOBILE—EVIDENCE—PROXIMATE CAUSE OF INJURY.**—In this action for damages to a motor truck from a collision with an automobile driven by one of the defendants, while the latter was attempting to pass the former upon a city street, it is held, under the evidence, that the proximate and effective cause of the collision was the violation by the defendant of the provision of the street ordinance requiring the driver of any vehicle, in overtaking and passing any other vehicle, to pass to the left, and not to drive to the right until clear of such vehicle, and not the violation by the plaintiff of the provision of the ordinance requiring the driver of any vehicle to keep as close to the right-hand curb as possible on all occasions. (*House v. Fry*, 157.)
11. **LIABILITY OF MINOR FOR TORT.**—A minor is civilly liable for a wrong done by him. (*Id.*)
12. **NEGLIGENCE OF CHAUFFEUR—LIABILITY OF OWNER.**—The owner of the automobile is liable for the negligence of the chauffeur, notwithstanding the latter was, at the time of such collision, driving the car in violation of instructions of the owner to wait for further orders before proceeding on the trip, where it appears that such driver was, at such time, on his way to a telephone to obtain such instructions. (*Id.*)
13. **MASTER AND SERVANT—DISREGARD OF INSTRUCTIONS—WHEN MASTER LIABLE.**—Where the servant acts within the general scope of his authority, notwithstanding the fact that he may be disregarding the directions of the employer, the latter may be held liable. (*Id.*)
14. **INJURY TO SAILOR FROM DANGEROUS HEAVING LINE—LIABILITY OF OWNER OF VESSEL.**—The owner of a vessel is liable in damages for personal injuries received by a sailor employed on the vessel from being struck by the sharp point of a steel spike in the end of a heaving line which was thrown ashore to him for the purpose of mooring the vessel, where it is shown that such line was not made up according to custom by the members of the crew from larger coils of rope supplied to them for that purpose, but was

## NEGLIGENCE (Continued).

one furnished by the owner to the plaintiff and his fellow-employees at the time they entered its service. (*Anderson v. Monticello Steamship Co.*, 296.)

15. **MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCES.**—It is the duty of the employer to furnish reasonably safe and suitable appliances for the use of his employees in the particular service in which they are engaged, and to keep such appliances in a reasonable state of repair. (*Id.*)
16. **DANGER OF EMPLOYMENT NOT ASSUMED.**—In an action to recover damages for such injuries it cannot be contended that the plaintiff assumed the risk incident to the appliance, where it is shown that the nature of its defect and danger of its use were not obvious, and that the plaintiff had never in fact been called upon to perform the particular duty which either required the use by himself, or exposed him to the danger incident to the use by others, of the heaving line. (*Id.*)
17. **DISCOVERY OF DEFECTS—STATUS OF SERVANT.**—A servant is not required to use any degree of care or diligence to discover defects in an apparatus which are not obvious, and he will be held to have assumed the risk only where he knew, and will be held to have known only when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which was gross negligence for him to neglect. (*Id.*)
18. **ATTEMPT TO BOARD MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.**—One who attempts to board an electric car while it is moving at the rate of nine to ten miles per hour, is guilty of contributory negligence which will defeat a recovery of damages for injuries received by him, even though the defendant is guilty of negligence in the operation of the train. (*Gaskill v. Pacific Electric Ry. Co.*, 593.)
19. **DEATH OF LABORER IN SEWER TRENCH—DANGEROUS PLACE TO WORK—LACK OF WARNING—LIABILITY OF MUNICIPALITY.**—A municipal corporation is liable in damages for the death of a laborer resulting from injuries received while working in a sewer trench being constructed by such corporation, where he was ordered by the agent of the corporation to go into the trench and shovel dirt around a manhole being therein constructed after the bracing and cribbing at the place where he was directed to work had been previously removed, leaving the walls of the trench without support, and no special warning given him of the danger from caving in of the excavation. (*Porterfield v. City of Modesto*, 598.)
20. **PERSONAL INJURIES—IMPANELMENT OF JURY—REFERENCE TO INSURANCE OF DEFENDANT AGAINST LOSS—CONDUCT NOT PREJUDICIAL—SUBSEQUENT EVIDENCE OF FACT.**—In an action for dam-

**NEGLIGENCE (Continued).**

- ages for personal injuries, the defendant is not prejudiced by the conduct of counsel for the plaintiff during the proceedings for the impanelment of the jury in getting before them the fact that the defendant was indemnified against loss by a surety company, where during a later stage of the trial the fact was permitted to go before the jury in the form of evidence without objection from one of the defendant's own witnesses. (*De Liere v. Goldberg, Bowen & Co., 612.*)
21. **DAMAGES—LOSS OF MONEY PAID ON LOT.**—In an action for damages for personal injuries, the plaintiff cannot recover as special damages the amount of the installments paid by her on a piece of real property, which she had lost by reason of her inability to keep up the payments in consequence of such injuries. (*Id.*)
22. **UNLOADING OF STEEL SHAFING FROM FREIGHT-CAR—METHOD OF REMOVAL—CARELESSNESS OF FOREMAN—FAILURE TO GIVE WARNING AS TO INTENTIONS.**—A railroad company is liable in damages for personal injuries received by an employee of a traction company, who had been loaned to it for the purpose of assisting its section foreman in unloading a heavy and unwieldy steel shafting from a freight-car to the station platform, where such injuries were occasioned by the act of the foreman in raising the shafting on to the steel apron connecting the car door with the platform, which caused the shafting to slide and fall, without first giving the plaintiff or any of his assistants notice of his intentions so to do. (*Fonts v. Southern Pacific Co., 633.*)
23. **EVIDENCE—PROPER METHOD OF UNLOADING—OPINION OF EXPERIENCED DRAYMAN.**—In an action for damages for such injuries, the opinion of an experienced drayman accustomed to handling heavy and cumbersome materials of all kinds is admissible as to the proper or more skillful way of removing such shafting. (*Id.*)
24. **RULES AND METHODS OF WORK—DUTY OF MASTER—PROPER INSTRUCTION.**—In such an action an instruction is not inapplicable that it is the duty of the master to exercise reasonable and ordinary care to adopt "safe rules" and methods of work, and that such duty is one that cannot be delegated in such a manner as to relieve the master from responsibility therefor. (*Id.*)
25. **DUTY TO GIVE WARNING—UNOBJECTIONABLE INSTRUCTIONS.**—The reading to the jury of several instructions in which it was stated, in substance, that, if they believed from the evidence that the method adopted for unloading the shafting was a perilous one, and "that the perils of the method so adopted were known to defendant's foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plaintiff thereof, and if you believe from

**NEGLIGENCE (Continued).**

the evidence that the plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant and for the plaintiff," is not subject to the objection that thereby the court unqualifiedly and plainly told the jury that the duty to give warning rested on the defendant. (Id.)

26. **FALL OF BOX FROM CHUTE—KNOWLEDGE OF DANGEROUS PLACE OF WORK—PLEADING.**—In an action to recover for injuries received from being hit on the back of the hand by a large box falling from a wooden chute which ran from the second to the first floor of defendant's warehouse, while the plaintiff was standing at the foot of the chute catching boxes as they descended thereon, it is not necessary that the complaint allege directly or by implication that the defendant knew or ought to have known of the alleged defects of the place assigned to the plaintiff to work, where it is alleged that the defendant negligently and carelessly, and without due care, directed the plaintiff to work at a place or with an appliance that was not safe. (*Poor v. W. P. Fuller & Co.*, 650.)
27. **EVIDENCE—CAUSE OF BOX LEAVING CHUTE—OPINION OF PLAINTIFF.**—In such an action there is no error in permitting the plaintiff to give his opinion as to what caused the box to fly off the chute and fall, where the answer of the witness shows that it was his theory that it was due to the bad condition of the chute rather than as to the way the boxes were dropped into it. (Id.)
28. **CONDITION OF CHUTE.**—Testimony that on a prior occasion the chute had shifted and that about fifteen minutes after the accident the legs of the chute were in bad condition, is admissible for the purpose of showing its condition at the time of the injury. (Id.)
29. **DUTY TO FURNISH SAFE PLACE TO WORK—PROPER INSTRUCTIONS.**—In such an action instructions are properly given to the effect that it was the duty of the employer to furnish his employees with a reasonably safe place to work, and with reasonably suitable and safe structures and appliances with which to do the assigned work. (Id.)
30. **FALSE TESTIMONY—DISTRUST OF WITNESS—INSTRUCTION.**—An instruction that if the jury considers that any witness has been false in any part of his testimony, such witness is to be distrusted in the remainder of his testimony, omits two essential elements, viz., the willfulness of the false testimony given and its materiality. (Id.)
31. **WHEELING OF WHEELBARROW ON ELEVATED AND NARROW RUNWAY—DEPARTURE FROM CUSTOMARY METHOD—DIRECTION OF EMPLOYER.**—A corporation engaged in the construction of a concrete wall as part of a power-house is guilty of negligence in directing a laborer employed by it to wheel a wheelbarrow along a plank runway forty feet above the ground and about four feet wide, and unprotected by any railing, and to return with his wheelbarrow,

**NEGLIGENCE (Continued).**

which was thirty inches wide, in the direction from which he had brought his barrow filled with cement and from which other laborers were approaching, instead of going around to the point of loading as was customarily done. (*Tubbs v. Stone & Webster Construction Co.*, 705.)

32. **ASSUMPTION OF RISK—QUESTION FOR JURY.**—Under such circumstances the risk the plaintiff incurred in turning back and in trying to pass approaching wheelbarrows was not one of the ordinary risks of the employment, but was a risk caused by the negligence of the master, and before it can be said, as a matter of law, that plaintiff assumed such risk, it must be shown that when he went ahead he knew and appreciated the danger. (*Id.*)
33. **FALL FROM RUNWAY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**—In an action to recover damages for injuries sustained by such a laborer in falling from the runway while placing his wheelbarrow in an upright position to allow approaching wheelbarrows to pass him, it is for the jury to say whether the plaintiff was guilty of negligence under such circumstances in moving too near to the outer side of the runway. (*Id.*)
34. **EMPLOYERS' LIABILITY ACT—EFFECT UPON CASE.**—Considering such action with reference to the provisions of the Employers' Liability Act of 1911 (*Stats.* 1911, p. 796), assumption of risk is no defense, and contributory negligence is a conditional defense dependent upon the comparative negligence of the parties. (*Id.*)

See *Physicians and Surgeons*, 6.

**NEGOTIABLE INSTRUMENTS. See Promissory Note.****NEW TRIAL.**

1. **STATEMENT OF CASE—FAILURE TO PRESENT IN TIME—MOTION FOR RELIEF—LACK OF JURISDICTION.**—Where a default in presenting a proposed statement on motion for a new trial, with the amendments thereto, has continued for a period of more than six months after the time prescribed by section 650 of the Code of Civil Procedure within which such papers must be presented, the trial court has no jurisdiction to relieve the party from the default. (*Van Cott v. Frank*, 450.)
2. **CONSTRUCTION OF SECTION 473, CODE OF CIVIL PROCEDURE.**—Section 473 of the Code of Civil Procedure applies to defaults in presenting a statement of the case on motion for new trial, and limits the time within which application may be made for relief therefrom to six months from the time of default. (*Id.*)
3. **MOTION FOR NEW TRIAL—INSUFFICIENT SHOWING.**—It is held that the affidavits presented on the motion for a new trial in this case

**NEW TRIAL (Continued).**

were insufficient to warrant the granting of the motion. (*Gaskill v. Pacific Electric Ry. Co.*, 593.)

See Appeal, 8; Eminent Domain.

**NOTARY PUBLIC.** See Criminal Law, 61-63.**NOTICE.** See Judicial Notice.**NUISANCE.**

1. **PUBLIC NUISANCE—INDECENT EXHIBITION OF WOMEN—INJUNCTION—JURISDICTION.**—The superior court has jurisdiction to restrain the proprietor of a public resort and place of amusement from conducting an indecent exhibition of the persons of the women therein employed, on the ground that such exhibition is a public nuisance, notwithstanding that such acts constitute the crime of indecent exposure as defined in section 311 of the Penal Code, for which, upon conviction, the law prescribes a penalty. (*Weis v. Superior Court*, 730.)
2. **ABATEMENT OF PUBLIC NUISANCE.**—Any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society, is a public nuisance, and under the provisions of section 731 of the Code of Civil Procedure, the district attorney is authorized to bring a civil action in the name of the people of the state to abate the same. (*Id.*)
3. **CRIMINAL ACTS—INJUNCTION.**—While courts of equity have no jurisdiction to enjoin the commission of acts merely because such acts when committed would constitute a crime, yet, where the threatened acts, if committed, in addition to being an indictable offense, constitute a public nuisance, such courts are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. (*Id.*)

**OAKLAND, CITY OF.** See Municipal Corporations, 4-7; Office and Officers, 3.

**OFFICE AND OFFICERS.**

1. **PUBLIC OFFICERS—SEPARATION OF DUTIES OF CONSOLIDATED OFFICES—DECLARATION OF VACANCY AND APPOINTMENT—POWER OF BOARD OF SUPERVISORS.**—A board of supervisors has no power, under section 4018 of the Political Code, which provides that where the duties of two offices have been consolidated, the board may by ordinance "elect to separate the duties so consolidated . . . without re-consolidation, and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the

---

**OFFICE AND OFFICERS (Continued).**

public interest will be best subserved thereby," after separating the duties of the office of county auditor and county recorder, to declare the office of auditor vacant and then proceed to fill it. (*People v. Gunn*, 114.)

2. **VACANCIES IN OFFICE—POWER TO FILL—CONSTRUCTION OF CODE.**—The power of a board of supervisors is limited to the filling of vacancies, and an office becomes vacant only upon the happening of any of the events enumerated in section 996 of the Political Code, and the separation of the duties of two offices is not a "removal from office" within the meaning of subdivision four of such section. (*Id.*)
3. **CITY OF OAKLAND—ORDINANCE CHANGING POSITIONS OF SANITARY AND PLUMBING INSPECTOR—INTERFERENCE WITH CIVIL SERVICE SYSTEM.**—Under the provisions of the freeholders' charter of the city of Oakland, which took effect July 1, 1911, and which introduced into the government of that city for the first time a civil service system, the city council cannot circumvent the object and purpose of the civil service system, by enacting an ordinance giving to the positions of deputy plumbing inspector and assistant sanitary inspector the name of deputy sanitary and plumbing inspector, without making any change in the duties of such position, and remove the incumbents under civil service regulation and appoint other persons in their places, and *mandamus* will lie to compel the commissioner of public health and safety to reinstate such discharged employees. (*Barry v. Jackson*, 165.)
4. **JUSTICES OF PEACE—COMPENSATION IN COUNTIES OF THIRTY-FIRST CLASS—AMENDMENT TO COUNTY GOVERNMENT ACT—CORRECTION OF INADVERTENT OMISSION OF PREVIOUS LEGISLATURE—CONSTITUTIONAL LAW—"COMPENSATION" NOT INCREASED.**—The amendment made by the legislature of 1915 to the County Government Act providing for the compensation of justices of the peace of counties of the thirty-first class (to which the county of Placer belongs), enacted to rectify the effect of an oversight of the legislature of 1913 to make any provision for the compensation of such judicial officers of counties of such class, does not involve an increase in the compensation of such officers within the meaning of section 9 of article XI of the constitution, as such enactment became necessary after the adoption of the amendment to section 15 of article VI of the constitution in 1911, whereby judicial officers were prohibited from reserving to their own use any fees or perquisites of office, which, prior to such amendment to the constitution, constituted their only source of compensation. (*Gwynn v. McKinley*, 381.)
5. **COMPENSATION OF PUBLIC OFFICER—ACT PROVIDING FOR INADVERTENT OMISSION—COMPENSATION NOT "INCREASED."**—An act whose purpose is merely to correct an inadvertence, and to provide for the

---

**OFFICE AND OFFICERS (Continued).**

compensation of a public officer where no compensation had theretofore existed, does not amount to an "increase" in compensation. (Id.)

6. **PUBLIC OFFICERS—SUPERVISORS OF LOS ANGELES COUNTY—COMPENSATION—CONSTRUCTION OF CHARTER.**—Under the charter of Los Angeles, which provides that it is not intended to affect the tenure of office of any elective officer of the county in office at the time the charter took effect, nor to change the compensation of any such officer during his term, the supervisors of the county, elected before the charter took effect, are entitled only to the salaries fixed by the general laws of the state and not to compensation provided by the charter, and this applies to a supervisor appointed to office after the charter went into effect, to fill a vacancy created by the resignation of one so elected. (*Pridham v. Lewis*, 395.)
7. **PUBLIC OFFICERS—RESIGNATION—MODE OF.**—Section 995 of the Political Code declares the mode in which a public officer may resign his office, namely, that it must be in writing, and if the incumbent be a county officer not commissioned by the Governor, it shall be made to the clerk of the board of supervisors. (*People v. Marsh*, 424.)
8. **DEFINITION OF "RESIGN" AND "RESIGNATION."**—The word "resign" is defined to "give up an office or trust," and "resignation" as being "the act of resigning or giving up, as a claim, possession, or position." (Id.)
9. **VACANCY IN OFFICE—HOW CREATED.**—Under section 996 of the Political Code an office becomes vacant on the happening of any of the events therein specified before the expiration of the term, including the resignation of the officer, and, under this statute, a vacancy arises when the incumbent resigns in the mode provided by law, subject to the terms contained in his letter of resignation. (Id.)
10. **RESIGNATION OF DISTRICT ATTORNEY—ACCEPTANCE UNNECESSARY.**—The resignation of the district attorney of a county which is in writing and in accordance with the statute, and by its terms to take effect upon delivery to the clerk of the board of supervisors, becomes effective immediately upon delivery to such clerk, and it is not necessary that it shall be accepted by the board of supervisors; and an attempt by the party, after delivery of the resignation to the clerk, and before its acceptance by the board, to withdraw the same, is of no effect. (Id.)
11. **FILING PAPERS—WHAT CONSTITUTES.**—No express provision is made in the law providing that a letter of resignation shall be filed, but, like documents which are required to be filed, the delivery thereof to the clerk of the board of supervisors, he being the officer designated by section 995 of the Political Code, to whom the resigna-

**OFFICE AND OFFICERS (Continued).**

- tion shall be made, constitutes the filing thereof; and it is not necessary to indorse such document as filed, the file-marks being only evidence of the fact of such delivery. (Id.)
12. **VACANCY—APPOINTMENT OF SUCCESSOR.**—Conceding that one who has tendered his resignation in the mode prescribed by statute to take effect immediately, or upon the delivery of the document to the clerk, may nevertheless hold over until his successor is appointed, such fact is not inconsistent with the theory that a vacancy exists in the office to be filled by the appointing power. (Id.)
13. **QUO WARRANTO—RIGHT TO PUBLIC OFFICE—STATUTE OF LIMITATIONS.** A *quo warranto* proceeding prosecuted by the attorney-general for the purpose of ousting one charged with wrongfully and without authority of law exercising the powers of a public office is not simply a civil remedy, but one wherein the interests of the public are involved, and, therefore, lapse of time constitutes no bar to such a proceeding. (People v. Bailey, 581.)
14. **JUDGMENT—SCOPE OF RELIEF.**—In such a proceeding the court is authorized by section 805 of the Code of Civil Procedure to provide not only for the removal of the defendant, but for the restoration to office of the relator. (Id.)
15. **RIGHT TO OFFICE OF CAPTAIN OF POLICE OF SAN JOSE—LACK OF LACHES.**—In a *quo warranto* proceeding to determine the right to the office of captain of police of the city of San Jose, the relator cannot be said to be guilty of laches by reason of the lapse of time between his ouster and the bringing of the proceeding, where it is shown that in the meantime he had brought a *mandamus* proceeding to collect his salary, which was finally decided against him on appeal on the ground that before a judgment could be rendered in his favor, it would be necessary to determine his right to the office, and the present action was begun ninety days after the final disposition of such *mandamus* proceeding. (Id.)
16. **PREVIOUS JUDGMENT IN PROHIBITION PROCEEDING—INSUFFICIENT ESTOPPEL.**—In such a proceeding a previous judgment rendered in a proceeding in prohibition to restrain the board of police and fire commissioners from trying the relator upon the charges preferred against him, is not sufficient as an estoppel to prevent the determination of the title to the office, where such former judgment simply recited that the board had passed an order reorganizing the police force, without further declaration that by reason of such reorganization the relator had been discharged from the force. (Id.)
17. **REMOVAL OF POLICE OFFICERS—CONSTRUCTION OF CHARTER.**—The provision of the charter of the city of San Jose that a police officer can only be removed for cause, and after trial, is not in conflict with section 16 of article XX of the constitution. (Id.)

**OFFICE AND OFFICERS (Continued).**

18. **OATH OF CAPTAIN OF POLICE.**—A captain of police of the city of San Jose is a member of the police force of such city, and where he takes an oath at the time of his appointment to the force, it is not necessary that he should again take an oath upon promotion. (Id.)

**ORDINANCE.** See Municipal Corporations, 1-3; Negligence, 7.

**PARENT AND CHILD.**

1. **SUPPORT OF ILLEGITIMATE CHILD—CONSTRUCTION OF SECTION 196A CIVIL CODE.**—Section 196a of the Civil Code provides, in the alternative, that an action to compel the father of an illegitimate child to support it may be brought either by the mother or the guardian of the child, and the mother not having chosen to bring the suit herself, it may be brought and maintained by the child through his guardian, either general or *ad litem*. (*Gambetta v. Gambetta*, 261.)
2. **AMOUNT OF ALLOWANCE—WHEN THE DETERMINATION OF THE TRIAL COURT CONCLUSIVE.**—In an action to compel a father to support an illegitimate child, where the trial court, with the pleadings and facts as to the financial ability of the respective parents before it, ordered the father to contribute twenty-five dollars per month to the support of the child, the appellate court will not on appeal interfere with the amount of the allowance. (Id.)
3. **SUFFICIENCY OF COMPLAINT.**—In such a case, where the complaint shows that the parents of the child were not married at the time of his birth, and that they have not since that time been married, the contention that the complaint is insufficient in that for aught that appears in it the defendant and the mother of the child may have been married at the time the child was conceived, and that therefore he is not illegitimate, is not sufficient for a reversal, although the complaint may be ambiguous and uncertain in this respect, where the evidence showed that the defendant is the father of the child and the latter's mother has never been married, and counsel for defendant admitted at the oral argument that "the plaintiff is a bastard." (Id.)

See Criminal Law, 22.

**PARTIES.**

**ACTION FOR MALPRACTICE—HUSBAND AND WIFE—ACTION BY WIFE ALONE—STATUTE OF LIMITATIONS.**—The husband is a necessary party to an action for damages for malpractice upon his wife, and where the husband deserts the wife after the acts of malpractice, the statute of limitations does not begin to run against the wife's

**PARTIES (Continued).**

right to bring the action in her own name until said desertion occurs. (*Mortell v. Los Angeles College of Osteopathy*, 422.)

See Corporation, 3, 4; Guaranty, 3; Promissory Note, 1; San Francisco Stock and Exchange Board, 7.

**PARTNERSHIP.**

1. **INTRUSTING MONEY TO PARTNER—DUTY TO ACCOUNT.**—A partner who is intrusted with money by his copartner to carry out the purposes of the partnership, acts as the trustee of his associate, and, as such, he is bound not only to an exercise of the highest degree of diligence and good faith in the administration of his trust, but he is also bound to keep and render a full and exact account of his transactions, and of all moneys received and their proper investment. (*Swanton v. Jacks*, 66.)
2. **ACTION FOR DISSOLUTION—DEFAULT OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this action for the dissolution of a partnership, an accounting, and for the recovery of certain moneys intrusted to the defendant by the plaintiff for partnership purposes, it is held that the finding that the defendant had willfully failed and neglected to attend to the business of the partnership, or to carry into effect the purposes for which it was formed, is sustained by the evidence. (*Id.*)
3. **ACCOUNTING—WHEN UNNECESSARY.**—Where a partnership involves but one transaction, and an accounting of the items thereof is had during the course of the trial, and finding made as to the balance due, it is unnecessary to find the items of the account, or to order an accounting to be had. (*Id.*)
4. **CONVERSION OF FUNDS—EVIDENCE—AMOUNT OF JUDGMENT.**—Where it is found that the defendant converted to his own use the money of the firm which the plaintiff himself had contributed thereto, it is proper to give the plaintiff judgment for the full amount, and not for one-half of such sum. (*Id.*)

**PAWNBROKER.**

1. **RECOVERY OF PLEDGED PROPERTY—EXCESSIVE INTEREST—ENTRY IN REGISTER—ABSENCE OF ESTOPPEL.**—In an action to recover certain personal property pledged to a pawnbroker as security for several loans, the plaintiff is not estopped from introducing oral proof that he was charged a rate of interest in excess of two per cent per month, and that he actually made payments at such excessive rate for several months, by reason of the fact that at the time of making such loans he signed an entry in the defendant's register reciting that the rate of interest was to be two per cent per month, and therein acknowledged that he had received a copy of

**PAWNBROKER (Continued).**

such register and redelivered it to the defendant. (*Innes v. Goldwater*, 101.)

2. **LEGALITY OF CONTRACT—TENDER OF AMOUNT OF PRINCIPAL OF LOANS—CONDITION PRECEDENT TO RECOVERY.**—In such an action the plaintiff is not entitled to recover without first tendering and offering to repay to the defendant the amount of his original loans, notwithstanding the violation by the defendant of the provisions of section 340 of the Penal Code, as the contracts for such loans are not wholly void, but legal so far as the principal sums of such loans, and the security therefor, are concerned, and only illegal as to the interest. (*Id.*)
3. **REGISTER OF PAWNBROKER—FAILURE TO DELIVER COPY TO PLEDGOR—VALIDITY OF CONTRACT.**—The failure of the pawnbroker to deliver to the pledgor a copy of his register entries as required by section 339 of the Penal Code does not render the contracts for the loans invalid, as the only penalty imposed by the section is a fine. (*Id.*)

**PERJURY.** See Criminal Law, 61-63.

**PHYSICIANS AND SURGEONS.**

1. **STATE MEDICAL ACT—TREATING SICK WITHOUT LICENSE.**—In this prosecution for having practiced a system or mode of treating the sick without a certificate issued by the state board of medical examiners, it is held on the authority of *People v. Jordan*, 172 Cal. 391, and *People v. Batledge*, 172 Cal. 401, that the judgment and order denying a new trial should be affirmed. (*People v. Vermillion*, 417.)
2. **PRACTICING WITHOUT COMPENSATION—VIOLATION OF ACT.**—The State Medical Act makes it unlawful for a person to practice any art of healing without having first obtained a certificate from the medical board, and the act is intended to cover such practice whether the service is gratuitous or not. (*Id.*)
3. **REFUSAL OF INSTRUCTIONS—WHEN PROPER.**—Where the court refuses to give certain instructions offered by the defendant for the reason that the same propositions have been sufficiently stated in the instructions given, it is not necessary for the court to state to the jury the reason for the refusal. (*Id.*)
4. **STATE MEDICAL ACT—TREATING THE SICK WITHOUT LICENSE—TEACHING CHIROPRACTIC SYSTEM.**—A teacher and demonstrator of the chiropractic system before a class in a chiropractic school, the subjects of such demonstration being the sick and afflicted who, at his hands, sought and received treatment free of charge, is not exempt from the operation of the State Medical Act. (*People v. Oakley*, 419.)
5. **TREATMENT OF PATIENT—DEGREE OF LEARNING AND SKILL REQUIRED.** There is no implied contract on the part of a physician who undertakes the treatment of one suffering from disease or injury, that

**PHYSICIANS AND SURGEONS (Continued).**

such treatment will prove a success, or that ill and serious results may not follow as the direct result of such treatment, but he nevertheless, by implication, guarantees that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will, in the treatment of his patient, exercise reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and where he possesses such degree of learning, and in applying it exercises ordinary care and skill, he is not liable for the results that follow. (*Priestley v. Stafford*, 523.)

6. **NEGLIGENCE OF PHYSICIAN—TREATMENT OF FRACTURED ARM.**—A physician who in the treatment of a fractured arm adjusted the splints and bandages in a manner so tight that no space was left for the enlargement of the arm due to the swelling that ordinarily follows in such cases, and who, upon being informed of such swelling, and of the great pain which the patient was suffering therefrom within a few hours after the treatment, neglected to visit the patient until the following day, and then took no steps to loosen the splints or relieve the pain except to suggest the administration of a dose of paregoric, is guilty of negligence in failing to exercise that degree of skill and care ordinarily exercised by the members of his profession. (*Id.*)

**PLACE OF TRIAL.**

1. **MOTION FOR CHANGE OF PLACE OF TRIAL—SUFFICIENCY OF AFFIDAVIT.**

It is held that the affidavit of the plaintiff on a motion for a change of place of trial in this action is positive in character, and was sufficient to raise a substantial conflict on the question of defendant's residence, for which reason the conclusion of the trial court will not be disturbed on appeal. (*Strauss v. Mowry*, 305.)

2. **CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF COURT.**—A motion for change of venue grounded upon the convenience of witnesses rests in the discretion of the trial court, the exercise of which will not be disturbed in the absence of a showing of its abuse; and it is settled that a mere preponderance in the number of witnesses claimed to be necessary to the moving party, does not entirely control the exercise of the court's discretion; regard may be given to the character of the proposed testimony, and the court may therefore determine for itself from the showing made whether or not there be any necessity for the testimony of any or all of the desired witnesses. (*Blossom v. Waller*, 439.)

3. **OPPOSITION TO MOTION—STIPULATION AS TO FACTS.**—Stipulations admitting facts alleged in the pleadings may properly be received in opposition to a motion for change of venue made upon the ground of the convenience of witnesses, and where a stipulation in a case

**PLACE OF TRIAL (Continued).**

has the effect of eliminating the defendant's cause of action for damages, as pleaded in his cross-complaint, and consequently the plaintiff would not have been put to the necessity of producing witnesses to testify in his behalf upon that phase of the case, there is no abuse of discretion in denying plaintiff's motion for a change of venue in so far as the order made involved the issues raised by the cross-complaint. (Id.)

4. **ISSUES MADE BY COMPLAINT AND ANSWER—TESTIMONY OF PLAINTIFF AND DEFENDANT ONLY NECESSARY—PROPER DENIAL OF MOTION.** On a motion for a change of venue made by the plaintiff on the ground of convenience of witnesses, where a stipulation of the defendant admitted facts set up in the cross-complaint which, in effect, eliminated the issues raised therein, and it appeared that the issues raised by the complaint and answer depended largely upon the testimony of plaintiff and defendant alone, between whom the convenience of attending the trial would not be a factor, and it did not appear that the showing made on behalf of plaintiff compels the conclusion that the greater convenience of the witnesses generally would be served by a trial of the action in the county of plaintiff's residence, the ruling of the trial court denying the motion will not be disturbed on appeal. (Id.)

See Justice's Court, 4-2.

**PLEADING.**

1. **JURISDICTION—DEMAND IN COMPLAINT DETERMINES.**—The demand set forth in the complaint determines the jurisdiction of the superior court in actions at law seeking a money judgment; and the fact that the demand is made up in part of items which may prove not to be recoverable will not make the complaint subject to demurrer upon that ground. (Welch v. County of Santa Cruz, 123.)
2. **ACTION UPON WRITTEN INSTRUMENT—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER.**—In an action between the original parties to a written instrument, the substance of which is pleaded, and from which it appears the defendant promised and agreed to pay the sum of money specified in the instrument, for value received, which upon proper demand it has failed and refused to do, the complaint is sufficient, as against a general demurrer, notwithstanding the writing may not have been such in form as to constitute a negotiable instrument. (Banca Commerciale Italiana di Genova v. P. Schlegel and Company, 300.)
3. **UNVERIFIED ANSWER TO VERIFIED COMPLAINT—EFFECT OF.**—An unverified answer to a verified complaint may be treated as sham and disregarded on a motion for judgment on the pleadings. (Consolidated Music Co. v. Morrison, 303.)

## PLEADING (Continued).

4. **UNCERTAINTY IN COMPLAINT.**—In this action it is held that the second amended complaint was ambiguous and uncertain and that the demurrers thereto were properly sustained. (*Lapique v. Ruef*, 391.)
5. **AMENDMENT—STATEMENT OF SAME CAUSE OF ACTION.**—In an action on a contract for the sale of real property where a demurrer was sustained to the first complaint, plaintiff thereafter filing an amended complaint in which he prayed that his title to the property be quieted, and upon a demurrer being sustained to this complaint, he filed a second amended complaint, setting up a cause of action for specific performance, it was error for the court to strike the latter complaint from the files on the ground that it embodied a new cause of action, where it appeared from the three pleadings that the cause of action was based upon an interest in the property in question created by the provisions of the contract of sale, the terms of which were set forth in full in each complaint, and which constituted the foundation of each cause of action attempted to be stated, the amendments only stating the facts in different forms to accord with the remedy which plaintiff conceived himself to be entitled, and not changing the cause of action. (*Annesley v. Francisco Machado Victurino*, 420.)
6. **QUIETING TITLE—AMENDED COMPLAINT—ALLEGATION OF FRAUD—CAUSE OF ACTION NOT CHANGED.**—Where the original complaint in an action to quiet title sets forth the cause of action in the form customarily used in such actions, an amended complaint which in addition to such allegations sets out acts amounting to fraud on the part of the defendant in procuring a deed from the plaintiff to the property in dispute, does not state a different cause of action. (*Koch v. Wilcoxon*, 517.)
7. **AMENDMENTS OF PLEADINGS.**—An amendment to a pleading may always be made to conform to the proof, provided the cause of action is not thereby changed. (*Id.*)
8. **AMENDMENT—SAME CAUSE OF ACTION—STATUTE OF LIMITATIONS.**—If the cause of action stated in an amended complaint is a new and totally different one from that stated in the original complaint, the amendment does not relate back to the beginning of the action so as to stop the running of the statute of limitations; but if the amendment is one which merely corrects a defective or erroneous pleading of the same cause of action, the amendment will relate back to the filing of the original complaint. (*Hunt v. Glassell*, 676.)

See *Certiorari*; *Claim and Delivery*, 1, 4; *Corporation*, 1; *Criminal Law*, 19–21; *Guaranty*, 2, 7; *Husband and Wife*, 7; *Insurance*, 10; *Justice's Court*, 11; *Libel*; *Mechanics' Liens*, 2–4, 6, 7; *Mortgage*, 3; *Negligence*, 26; *Parent and Child*, 3; *Promissory Note*, 8; *Sale*, 5, 18; *Specific Performance*, 1, 2, 5, 6; *Taxation*, 2.

**PLEDGE.**

1. **PROMISSORY NOTE—PLEDGE OF CORPORATE STOCK—SALE—WAIVER OF NOTICE.**—Where a promissory note recites the fact of deposit with the payee of corporate stock as security for the payment of the obligation, and that the latter has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call, the obligation shall immediately become due and payable, or the payee, or its assignee, may sell or collect the securities at public or private sale at any time without demand, judgment, or notice, they being expressly waived, a sale at public auction of the security in accordance with the code without notice, is valid; and the contention that the waiver was limited to the condition which might arise on failure of the pledgor to furnish additional security called for, cannot be maintained. (*Williams v. Parker*, 71.)
2. **PLEDGE WITH POWER OF SALE—RIGHT OF PLEDGEE.**—While it is true that the relation existing between parties to a transaction where collateral is placed in the hands of the pledgee as security for the payment of a debt, with power of sale in case of default, is in the nature of a trust relation, and that the power must be exercised in good faith, yet, where the pledgee makes the sale in the manner provided by law, and in accordance with the conditions of the contract, and it is not shown that he did, or caused to be done, anything for the purpose of preventing a fair sale, the pledgor has no right to complain. (*Id.*)
3. **NOTE FOR STOCK—AGREEMENT NOT TO SUE—LACK OF ESTOPPEL.**—In an action to recover on a promissory note transferred by the corporation payee to another corporation as part payment of corporate stock, the transferee is not estopped from bringing the action by reason of a proposed agreement to dissolve the two corporations, and not to enforce collection of the note which was originally given for stock in the former corporation. (*Id.*)

See Pawnbroker; Promissory Note, 9-11.

**PRACTICE.**

1. **RIGHT OF COURT TO TAKE CASE FROM JURY.**—The court is authorized to take the case from the jury when, upon the whole evidence, were a verdict returned in favor of the plaintiff, the court would feel impelled to set it aside as unsupported by the evidence. (*Gaskill v. Pacific Electric Ry. Co.*, 693.)
2. **DIRECTED VERDICT—VIEWS OF JURY IMMATERIAL.**—Where the court directs the verdict of the jury it is immaterial whether the jurors agree with the court or not. (*Id.*)

See Appeal; Costs; Eminent Domain; Evidence; Execution; Fees; Findings; Instructions; Judgment; Justice's Court; New Trial; Parties; Place of Trial; Pleading; Summons.

**PRINCIPAL AND AGENT.** See Agency.

**PROBATE LAW.** See Estates of Deceased Persons.

**PROMISSORY NOTE.**

1. **DISTRIBUTION TO LEGATEES—RIGHT TO SUE ON JOINTLY.**—Where a promissory note, among other assets of the estate of a deceased person, is distributed to the legatees jointly, the latter may jointly sue upon it without first having their respective shares therein partitioned and assigned to them under section 1675 of the Code of Civil Procedure, as it is not compulsory on them under this section to ask for a partition of their interests in severalty. (*Moore v. Lauff*, 452.)
2. **ACTION ON PROMISSORY NOTE—CONSIDERATION—ERRONEOUS EXCLUSION OF EVIDENCE.**—In an action on a promissory note, where the defendants in their answer do not deny its execution or the fact of nonpayment, but allege that it was given as security for the faithful performance on their part of a certain agreement, it is error for the court to exclude evidence offered by the defendants to support this plea, where it appears that the note was executed almost one year after the making of the contract, the contract containing no condition for the giving of security, but being complete in its recital of the things agreed upon by the parties, and when the note was given the time not having arrived when the defendants were called upon to account. (*Harbold v. Slocum*, 479.)
3. **CONSIDERATION FOR INDORSEMENT—CONTEMPORANEOUS EXECUTION—FINDINGS—PRESUMPTIVE EVIDENCE OF INDORSEMENT.**—An indorsement of a promissory note is itself presumptive evidence of a consideration therefor and that it was made contemporaneously with the execution of the note, and such evidence may be resorted to in aid of findings to such effect in an action to recover upon the indorsement, even though such presumption stands alone and is opposed by direct evidence to the contrary. (*Pacific Portland Cement Company, Consolidated, v. Reinecke*, 501.)
4. **EVIDENCE—DISPUTABLE PRESUMPTION—WEIGHT AS AGAINST ADMITTED OR PROVED FACT—EXCEPTION.**—The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all the evidence including the presumption. (*Id.*)
5. **ACTION ON INDORSEMENT OF PROMISSORY NOTES—EVIDENCE—PRESENCE OF NAMES AT TIME OF DELIVERY—UNOBJECTIONABLE QUESTION.**—In an action against the indorser and guarantor of two promissory notes, a question addressed to a witness for the plaintiff as to whether at the time the notes were delivered to him the

**PROMISSORY NOTE (Continued).**

names were written on the back of the notes, is not objectionable as leading and calling for the conclusion of the witness. (Id.)

**6. INDORSEMENT OF SURRENDERED NOTES BY DEFENDANT — IMPROPER CROSS-EXAMINATION.**—In such an action there is no error in sus-

taining an objection to a question addressed to a witness for the plaintiff on cross-examination, as to whether or not the defendant had indorsed certain notes for the maker of the notes in question, which were surrendered and canceled upon the execution of the notes in suit, where nothing had been developed upon the direct examination of the witness which warranted the testimony. (Id.)

**7. INDORSEMENT OF OTHER NOTES — PROPER CROSS-EXAMINATION.**—

There is no error in such an action in permitting the defendant to be cross-examined over objection concerning the fact that he was indorsing a great many notes for the maker about the time of the execution of the indorsement and guaranty of the notes in suit, where he had testified on direct examination that he had indorsed the notes after their execution and delivery as an accommodation to the plaintiff. (Id.)

**8. PLEADING — AMENDED COMPLAINTS — SAME CAUSE OF ACTION.**—In

an action on a promissory note, where the original complaint demanded judgment upon a certain promissory note for a certain sum with a certain date and payable one year after date, an amended complaint was afterward filed setting forth a note of the same date and amount as before and in like terms, except that it read ten months after date instead of one year, and omitted the provision for interest contained in the note set out in the original complaint, and a second amended complaint alleged the execution of the note in the same terms as the note set out in the first amended complaint, and alleged further facts showing that at the time of the commencement of the action plaintiff was unable to see the note or obtain a copy thereof, and was obliged to rely upon his recollection of its terms, but that he had seen the note about the date it was made, and alleging that there was but one note for the amount claimed made by the defendant at the date alleged, and that the note sued on in the second amended complaint was the same incorrectly set out in the original complaint; *held*, that the cause of action set out in all the complaints was the same, and the second amended complaint related back to the time of the filing of the action so as to stop the running of the statute of limitations. (Hunt v. Glassell, 676.)

**9. PLEDGE OF NOTE — PAYMENT OF PRINCIPAL DEBT — LIABILITY FOR**

**BALANCE OF PLEDGED NOTE.**—Where the maker of a promissory note secures possession of it from one to whom it is pledged, with his knowledge, to secure payment of a smaller note, by paying only the amount of the claim of the pledgee therein, leaving a balance un-

**PROMISSORY NOTE (Continued).**

satisfied on the larger note, the owner of the note is entitled to recover against him for the unpaid balance. (Id.)

10. **PLEDGE OF PROMISSORY NOTE—RIGHT OF PLEDGEE.**—A pledged promissory note is not property subject to sale by the pledgee; he has only the right to collect it when due, and, under the circumstances, no transaction could take place between the maker of the larger note and the pledgee which would put the maker in any better position with respect to the pledged note than that of the pledgee, where the general property of the note still remains in the payee. (Id.)
11. **SETTLEMENT OF CLAIM SECURED BY PLEDGE—WHEN PLEDGEE NOT BOUND.**—The contention that, because an action by the pledgee of the promissory note to recover upon it was against the pledgor as well as the maker of the note, and the second amended complaint in this action on the pledged note alleges that, after answer filed, the defendant "settled the said cause of action by then and there paying to said plaintiff in said action" an amount about equal to the principal of the note secured by the pledge, the inference follows that the settlement was made with the pledgor as well as with the pledgee, and the pledgor consented to the surrender of the note to the maker, cannot be maintained, where it is further alleged that the payment was made on the note secured by the pledge and to settle all claim that the pledgee had as security. (Id.)
12. **CONSIDERATION—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.**—In an action on a promissory note, where two of the comakers of the note contend that it was given in consideration of the payee desisting from further prosecution of the third maker on a criminal charge, but the evidence is conflicting upon this issue, the findings of the trial court in favor of the plaintiff are conclusive on appeal. (Tischhauser v. Prentice, 699.)
13. **DELIVERY OF NOTE IN VIOLATION OF CONDITION—IGNORANCE OF PAYEE OF CONDITION—VALIDITY OF NOTE.**—In an action upon a promissory note executed by three parties, where two of the makers contend that they signed and delivered the note to the third upon the condition that he should obtain the signatures of two other parties before delivering it to the payee, which condition was not fulfilled, the breach of the condition is not a defense to an action upon the note, where the payee was not advised of the condition at the time of its acceptance; and the same is true of a defense that the signatures of these parties were obtained by fraud practiced upon them by the third party, the payee having no knowledge of these facts. (Id.)
14. **CONSIDERATION—EXTENSION OF TIME FOR PAYMENT OF DEBT.**—The extension of time for payment of a debt presently due is a valuable

**PROMISSORY NOTE (Continued).**

and sufficient consideration for a promissory note given for the amount of the debt. (Id.)

See Pledge.

**PUBLIC LANDS.**

**RECEIVER'S FINAL RECEIPT—CONVEYANCE OF EQUITABLE TITLE.**—The issuance to an applicant for a patent to government land of the receiver's final receipt constitutes a conveyance to him by the government of the equitable title, and thereafter the government, until patent is issued, holds the legal title as a mere trustee for the applicant without any further proprietary interest in the land. (Cohn v. Francis, 742.)

**PUBLIC OFFICERS.** See Office and Officers.

**QUIETING TITLE.** See Pleading, 6.

**QUO WARRANTO.** See Office and Officers, 13-15.

**RAILROAD.**

1. **RAILROAD CORPORATIONS—NATURE OF CONTRACTS FOR RIGHTS OF WAY.**—While it is true, where land has been taken for public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time of the taking, and while it is also true that this right to compensation is a personal one which does not run with the land, nor pass by conveyance thereof after the right accrues, such doctrines in no way affect or abridge the right of railroad corporations to enter into a binding obligation or contract, with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. (East San Mateo Land Co. v. Southern Pacific R. R. Co., 223.)
2. **ACCEPTANCE OF CONVEYANCE UPON CONDITION—RIGHT OF RAILROAD CORPORATION.**—A railroad may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant, and such a contract may create an estate less than a fee in land taken for a right of way. (Id.)
3. **EXPIRATION OF LIMITED ESTATE—CONTINUANCE OF USE—DUTY OF RAILROAD CORPORATION.**—Where an estate is granted to a railroad corporation for a limited period, and at the expiration thereof, the corporation elects to continue its use for a right of way, it can only do so by compensating the reversioner. (Id.)

See Deed, 1, 2.

**RAPR.** See Criminal Law, 64-69.

**RECORDATION.** See Broker, 3-8.

**REFERENDUM.** See Municipal Corporations, 1.

**RESCISSION.**

1. **SALE OF TOURING CAR—FRAUD—INABILITY TO RESTORE CAR TAKEN IN EXCHANGE.**—A vendee under a contract for the purchase and delivery of a new touring car is not deprived of his right to rescind the contract upon discovery that the car received by him was not a new car, because of the fact that the vendor had resold the car of the vendee, which he received in part consideration of the sale, notwithstanding the vendee had knowledge that the vendor intended to, and did, sell such car. (*United Motor San Francisco Co. v. Callander*, 41.)
2. **LIABILITY OF VENDOR—DAMAGES.**—Under such circumstances, the vendor must make good in damages the value of the car which if cannot restore, and this it may be required to do in the action for rescission. (*Id.*)
3. **PROMPTITUDE IN RESCISSION—CONSTRUCTION OF CODE.**—The first requisite of rescission is prompt action, and subdivision 1 of section 1691 of the Civil Code is mandatory as to the promptitude required, except as to the cases therein enumerated, and others where a sufficient showing is made in excuse for the delay. (*Id.*)
4. **USE OF CAR—EVIDENCE—PROMPT RESCISSION.**—In an action to recover on the promissory note given as part consideration of the sale, it cannot be contended that the vendee failed to rescind the contract within a reasonable time, from the fact that he made no attempt so to do until two days before his note fell due and after he had used the car almost a month, where it is made to appear that he received the car under a warranty of a reputable firm that it was a new car, and that he was about to become the agent for the sale therefor in the locality. (*Id.*)
6. **REMOVAL OF PARTS OF CAR BY VENDEE—EXHIBITS IN COURT—RESCISSION UNAFFECTED.**—The defendant in such action is not precluded from asserting his right to rescind on the ground that he exercised acts of ownership over the car inconsistent with his claim that he was holding it subject to plaintiff's order, where such acts consisted in taking off the wheels, detaching some parts of the car, and bringing them into court as exhibits at the trial, while the car was in the custody of the sheriff under attachment, in the absence of any showing that the car was injured or its value impaired by the temporary removal of such parts, or that the defendant was prevented thereby from delivering the car to the

**RESCISSION (Continued).**

plaintiff as the court directed, on compliance by plaintiff on its part with the judgment of the court. (*Id.*)

See *Sale*, 6, 15.

**RESIDENCE.** See *Divorce*, 1; *Summons*.

**RESTRAINT OF TRADE.** See *Sale*, 13, 14.

**RIGHT OF WAY.** See *Deed*, 1, 2; *Railroad*.

**ROBBERY.** See *Criminal Law*, 70-77.

**SALE.**

1. **CONTRACT—SALE OF PUMPING-PLANT EQUIPMENT—BREACH—EVIDENCE—BURDEN OF PROOF—CAPACITY OF WELL.**—In an action to recover damages for a breach of a contract for the sale of a pumping-plant equipment, which the vendor guaranteed was capable of lifting eighty inches of water, equivalent to 720 gallons per minute, provided the water in the well did not, when pumping, lower more than twenty feet below the pump, the burden is upon the vendee to affirmatively show that he had developed a sufficient amount of water in the well, which, had the plant been what it was guaranteed to be, would, if incapable of pumping the number of gallons per minute provided by the contract, at least have lifted a sufficient amount of water to meet the requirements of the vendee and not cause him any damage. (*Fairbanks, Morse and Co. v. Zimmerman*, 81.)
2. **CAPACITY OF OTHER WELLS—INSUFFICIENCY OF PROOF.**—Evidence that other wells, in the vicinity of the well in question, of varying depths, and ranging in distance from a quarter of a mile to a mile therefrom, which, after being developed, produced water in sufficient quantity to irrigate the lands tributary thereto, is not only vague, but wholly insufficient to establish the capacity of the well. (*Id.*)
3. **PRUNE CROP—PERFORMANCE—REJECTION OF PORTION OF CROP.**—The purchaser under a contract for the sale and delivery of a crop of dried prunes, which had already received and accepted the larger portion of the crop, and requested an extension of time for the delivery of the remainder, which was accorded to it by the seller only after the manager of the purchaser had personally inspected such remainder and expressed satisfaction therewith, with the exception of a single and severable ton, which he also expressed willingness to accept if put in condition, is not justified in rejecting the whole of such remainder on the ground that the excepted ton had not been put in proper condition, but should have confined such rejection to such ton and accepted the prunes which were up to the contract requirement. (*Morrell v. San Tomas Drying and Packing Co.*, 194.)

**SALE (Continued).**

4. **CONTRACT—SALE OF MOTOR CARS—RETENTION OF DEPOSIT AS DAMAGES—RECOVERY OF EVIDENCE—DUTY OF SELLER.**—Where a contract for the sale of motor cars provided that in case of the cancellation of the contract before its expiration, or in the event that its terms should not be fully complied with by the purchaser, the deposit should be retained by the seller as damages, it is the duty of the seller in an action by the purchaser to recover such deposit, on the theory of a rescission of the contract by mutual consent, to show that he has been actually damaged in the sum deposited, or that one of the other contingencies mentioned in the contract had arisen upon which he was entitled to retain the deposit. (Thomas v. Anthony, 217.)
5. **PRESUMPTION AGAINST VALIDITY OF LIQUIDATED DAMAGES—EXCEPTION TO BE PLEADED AND PROVEN.**—In order to entitle a defendant to retain the sum deposited with him as contingent liquidated damages for the breach of an obligation, it is incumbent upon him to show not only by averment, but also by proof, that his case is within the exception contained in section 1871 of the Civil Code, for without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that such agreement is void. (Id.)
6. **RESCISSON OF CONTRACTS—POWER OF AGENTS.**—Presumptively an agent is employed to make contracts, and not to modify or rescind them; to acquire interests, not to give them up, and no power to vary or cancel an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests of his principal, unless the principal knew or approved of such modifications by the agent. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle upon his own discretion, as to overcome this presumption, and bind the principal by the modification, rescission, or release of the agent. (Id.)
7. **CHANGE OF SALE PRICE—RESERVED RIGHT—EFFECT OF.**—An agency contract providing for the purchase of fifty motor cars between specified dates covering a period of almost one year, is not void by reason of the reservation therein of the right to change the list and net prices of such cars at any time by giving the purchaser two weeks' notice of such proposed change, where the purchaser's brokerage or discount is not altered by such change. (Id.)
8. **CANCELLATION OF CONTRACT—RESERVED RIGHT OF SELLER—EFFECT OF.**—Such a contract is not void for lack of mutuality by reason of the provision therein reserving to the seller the right to cancel the contract upon fifteen days' notice and returning unused deposits. (Id.)
9. **BREACH OF WARRANTY OF QUALITY—SUFFICIENCY OF EVIDENCE.**—In this action for damages for the breach of an express warranty

**SALE (Continued).**

which accompanied the sale of a certain quantity of coffee bags to the plaintiff by the defendant, it is held that the finding that the bags were not in the warranted condition upon their arrival at the port of destination is supported by the evidence. (*W. R. Grace and Company v. Levy*, 231.)

10. **MEASURE OF DAMAGES—MARKET VALUE AT PLACE OF DESTINATION—WHEN ADMISSIBLE.**—Where it was not practicable for the plaintiff to inspect the bags at the place of shipment, and the defendant had knowledge at the time of sale as to where they were to be shipped and used, it is proper to fix the damages with reference to the market value of the bags at the port of destination rather than where they were baled and received. (*Id.*)
11. **EVIDENCE—KNOWLEDGE OF PLACE AND USE OF BAGS.**—In such an action it is not error to permit the defendant as a witness for the plaintiff to be interrogated as to his knowledge, "at the time of the concluding of the transaction," concerning the place where the bags were to be used. (*Id.*)
12. **RECOVERY OF DAMAGES—BREACH OF WARRANTY—INSPECTION PRIOR TO DELIVERY—EFFECT OF.**—The right of a buyer of personal property to recover damages for breach of an express warranty is not affected by an inspection of the property before delivery. (*Id.*)
13. **CONTRACT—SALE OF JEWELRY BUSINESS—AGREEMENT NOT TO ENGAGE IN SIMILAR BUSINESS—EVIDENCE—BREACH OF CONTRACT.**—A contract in which it was agreed that the seller of a jewelry business would not engage in the same business in the city in which such business was being conducted, for the period of twenty years, either for himself or as the employee of another, and that if he did so he would respond in liquidated damages in a specified sum, is violated by the opening of another jewelry store in the same city under the name and sign of the son of the seller in the building owned by the latter, who personally superintended the fitting up of the store, furnished all money for the purchase of the stock, and for a considerable period of time after the opening of the store did all of the finer and more extensive repair work in the store premises and collected and receipted for the money paid for such work. (*Akers v. Rappe*, 290.)
14. **CONTRACT NOT TO ENGAGE IN BUSINESS FOR TWENTY YEARS—TIME NOT UNREASONABLE.**—A contract not to engage in the same business for the period of twenty years in the city in which a business sold was conducted is not void on the ground that the time is unreasonably long, where the successors in interest of the buyer, after the lapse of six years of the time, are still conducting the original business. (*Id.*)
15. **FAILURE TO DELIVER WITHIN TIME—RESCISSION.**—Where a contract for the sale of an automobile provides for the delivery of the machine within thirty days from the date of the contract, and the

**SALE (Continued).**

vendor fails to make such delivery within such time, and time is of the essence of such contract, the vendee is entitled to rescind and recover whatever he has paid under the contract. (*Mettler v. Vance*, 499.)

16. **BREACH OF CONTRACT—TIME OF PERFORMANCE.**—A contracting party is not excused from performing his contract within the time agreed upon, further than that in certain contracts failure to perform strictly to contract, as to time, does not authorize the other party to rescind. (*Id.*)
17. **ACTION TO ESTABLISH INTEREST IN STALLION—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.**—In an action to recover one-half of the proceeds on the sale of a stallion, plaintiff claiming to have been a tenant in common with the defendant of the stallion, where the evidence is conflicting and defendant's testimony, if believed by the court, was sufficient to sustain a finding in his favor, it will not be disturbed on appeal. (*Smith v. Reis*, 579.)
18. **ACTION FOR GOODS SOLD—PLEADING—PRESUMPTION AS TO OWNERSHIP OF DEBT.**—In an action for goods sold the complaint sufficiently shows the ownership of the indebtedness at the time of the filing thereof, where it is alleged that the defendant was indebted to the plaintiff for such goods on a date prior to the filing of such complaint, and it is further alleged that such indebtedness has not been paid to the plaintiff. (*Hooper v. Smith*, 460.)

See Husband and Wife, 5-7; Rescission; Specific Performance; Vendor and Vendee.

**SAN DIEGO, CITY OF.** See Municipal Corporations, 1-3.

**SAN FRANCISCO, CITY AND COUNTY OF.** See Taxation, 2-4.

**SAN FRANCISCO STOCK AND EXCHANGE BOARD.**

1. **OWNERSHIP OF PROPERTY.**—The property purchased by the San Francisco Stock and Exchange Board at an early date in the history of the association by contributions and fees of membership for the purpose of having a building for the convenience of the members and their business was in equity the property of such members, notwithstanding that the title thereto was taken in the name of a corporation composed entirely of such members known as the Company of Associated Stockholders, which had no other purpose for existence than to hold the legal title to the property and manage the same for the benefit of the members of the board. (*Hassey v. Ruggles*, 19.)
2. **RELATIONSHIP BETWEEN MEMBERS AND BOARD—"SEAT."**—Under the articles of agreement creating the San Francisco Stock and Exchange Board, the rights and equities of its members with respect to the assets, and the particular advantages which accrued to each

**SAN FRANCISCO STOCK AND EXCHANGE BOARD (Continued).**

member thereof, were all comprised and defined by the terms "the seat and privileges of membership," and each member in good standing could dispose of his "seat," and with the consent of the board introduce his successor in interest into the body of its membership, and in case of the death of a deceased member the board itself was given the right and charged with the duty of disposing of the "seat" for the benefit of the widow and children of the deceased member; and in case of a delinquent member, the president of the board became invested with a trusteeship over the "seat," with power of disposition and of distributing the proceeds among those of his fellow-members who were creditors. (Id.)

3. **DIVISION OF PROCEEDS—AGREEMENT OF LIVING MEMBERS—SHARE OF DECEASED MEMBER—WAIVER.**—The execution of a written agreement, after the sale of the property, by all the living members of the board to divide the proceeds of the sale among themselves and the representatives of deceased members, gives the representative of a deceased member, who did not sign such agreement, an equal advantage with one who did, where it appears that the former was not given an opportunity to sign or participate in its benefits, as the execution of the agreement constituted a waiver on the part of the living members to any portion of the share of such deceased member. (Id.)
4. **SALE OF PROPERTY—PROPORTIONATE SHARE OF PROCEEDS OF DECEASED MEMBER IN GOOD STANDING—DISTRIBUTION AMONG CREDITORS—ILLEGAL ACTION OF PRESIDENT OF BOARD.**—Upon a sale of the property of the San Francisco Stock and Exchange Board, the president of the board to whom was paid over, as trustee, the proportionate share of the proceeds of the sale belonging to a deceased member, has no right to distribute the same among the asserted creditors of the deceased, where such member was in good standing at the time of death and had not disposed of his "seat" in the board. (Id.)
5. **ACTION TO RECOVER SHARE—FINDINGS—EQUITABLE INTEREST—CONTINUING SECURITY.**—In an action by the administrator of the estate of the deceased member of such board to recover the share of the proceeds of the sale to which said estate is entitled, the issue that under the constitution and by-laws of the association the equitable interests of every member therein shall be and remain a continuing security to all members of the board with whom he might deal for the performance of his contracts and the fulfillment of his obligations, is covered by the finding that the deceased was in good standing and owed no obligations to the members thereof. (Id.)
6. **INDEBTEDNESS OF DECEASED MEMBER TO FELLOW-MEMBERS—IMMATERIALITY—EFFECT OF WAIVER.**—The question whether or not the deceased member at the time of his death was indebted to his fellow-members in any sum is not material, by reason of the waiver of

**SAN FRANCISCO STOCK AND EXCHANGE BOARD (Continued).**

any claim to any portion of the share of such member from the execution of the agreement. (Id.)

7. **PARTY PLAINTIFF—SUBSTITUTION OF HEIR FOR ADMINISTRATOR.**—In such an action the defendants cannot contend that the administrator had no authority to bring the action, or that the judgment was in favor of a person not an original party to the action, by reason of the substitution of the only heir of the deceased as plaintiff without objection. (Id.)
8. **JUDGMENT—MEMBERS OF BOARD AND PRESIDENT.**—A judgment in such action against all the members of the board as well as its president is proper, where it is shown that at all times such president was the authorized agent of the board. (Id.)

**SPECIFIC PERFORMANCE.**

1. **CONTRACT FOR LEASE OF LAND—PLEADING—SUFFICIENCY OF COMPLAINT—CONDITIONS TO EXECUTION—CONSTRUCTION OF CONTRACT.**—A complaint in an action for the specific performance of a contract for a lease of land for the purpose of exploring the same for oil is not subject to general demurrer on the ground that it disclosed that the lease was to be executed only when the patent to the land had been issued and the land conveyed to the defendant, where it is alleged that such defendant had received a conveyance of such land after the issuance to his grantor of the final receipt of the receiver of the United States land office for a patent to such land, and it appears from the contract that no express reference is made therein to a patent, but the execution of the lease was made dependent upon "the consummation of the patent proceedings." (Colm v. Francis, 742.)
2. **CONTRACT TO SELL TO THIRD PARTY—SUFFICIENCY OF COMPLAINT—CONSUMMATION OF SALE NOT SHOWN.**—In such an action the complaint is not subject to general demurrer in alleging that the defendant, previous to the commencement of the action, made a transfer of all her interest in the property to a third party, where there is no further averment that she had disposed of or sold the land. (Id.)
3. **CONTRACT FOR LEASE OF OIL LANDS—SUFFICIENCY OF CONSIDERATION—DEVELOPMENT WORK.**—"Development work" already performed and to be performed is a sufficient consideration to support a contract for a lease of lands for the discovery of oil. (Id.)
4. **LEASE—ADEQUACY OF CONSIDERATION.**—An agreement on the part of the lessee of oil land to do all work at his own expense, pay all taxes on the personal property, and pay to the lessor as rent or royalty one-eighth of all the proceeds of oil produced, constitutes a fair, just, and reasonable consideration for the lease. (Id.)

**SPECIFIC PERFORMANCE (Continued).**

5. **PLEADING—SUFFICIENCY OF COMPLAINT—TRUTH OF FACTS.**—In passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. (Id.)
6. **SPECIFIC PERFORMANCE OF CONTRACT—ADEQUACY OF CONSIDERATION—PLEADING AND EVIDENCE.**—Adequacy of consideration for a contract whose terms are sought to be enforced through a decree of a court of equity must be pleaded and proved. (Id.)

**STATUTE.**

**STATUTORY CONSTRUCTION—EFFECT TO BE GIVEN EVERY PART OF STATUTE.**—It is a cardinal rule of interpretation of statutes that effect, if possible, must be given to every clause and part thereof. (*Austin v. Strang*, 265.)

See Common Law; Criminal Law, 29.

**STATUTE OF FRAUDS.** See Broker, 1.

**STATUTE OF LIMITATIONS.** See County; Deed, 8; Insurance, 9; Office and Officers, 13-16; Parties; Pleading, 8.

**STOCK AND EXCHANGE BOARD.** See San Francisco Stock and Exchange Board.

**STOCK AND STOCKHOLDERS.** See Corporation.

**STREET ASSESSMENT.**

1. **STREET LAW—RECOVERY UPON BOND—PLACE OF FILING STATEMENT OF CLAIM.**—In a case of street improvement work done under contract with a municipal corporation in accordance with the Street Work Act of 1885 (Vrooman Act) and amendments thereto, a claimant furnishing material therefor who seeks to recover on the bond given in connection with the contract must file his statement of claim, as directed by section 6½ of such act, with the superintendent of streets, and such a statement filed with the board of trustees and not delivered to such superintendent or filed in his office is not a compliance with such section, although the same was addressed to both the superintendent and board of trustees. (*San Dimas Quarry Co. v. American Surety Company of New York*, 3.)
2. **PUBLIC WORK—FILING STATEMENT OF CLAIM—INAPPLICABILITY TO CONTRACTS UNDER VROOMAN ACT.**—The act of March 27, 1897 (Stats. 1897, p. 201), requiring mechanics employed upon public work who seek to recover upon the contractor's bond to file the statement of their claims with the board of trustees, is not ap-

**STREET ASSESSMENT (Continued).**

- pllicable to work done under the Vrooman Act, as the adoption of section 6½ of such act (Stats. 1899, p. 23) in 1899 repealed the act of 1897 in so far as such act could be said to be applicable to work which came under the scope of such section. (Id.)
3. **STATUTORY BOND—CONDITIONS OF RECOVERY.**—In an action to recover upon such a bond it is essential that the plaintiff show that all the requisites of the statute have been observed, as he cannot recover thereon as a common-law bond. (Id.)
4. **STREET LAW—PURCHASE OF PROPERTY FOR DELINQUENT ASSESSMENTS BY MUNICIPALITIES—CONSTITUTIONALITY OF IMPROVEMENT BOND ACT OF 1915.**—The provision of the Improvement Bond Act, approved June 11, 1915, that a municipality, in the absence of any other purchasers, must purchase all property offered at delinquent sales for the nonpayment of street assessments, is not within the inhibition of section 18 of article XI of the constitution, which prohibits a municipality from incurring any liability not to be satisfied during the current fiscal year in which the same is incurred without support of a two-thirds vote of the electorate. (Federal Construction Co. v. Wold, 860.)
5. **CONSTITUTIONAL LAW—INCURRING OF LIABILITIES BY MUNICIPALITIES—APPLICABILITY OF PROVISION.**—The provision of section 18 of article XI of the constitution limiting the incurring of liabilities by municipalities only refers to acts or contracts of municipalities, and not to liabilities which the law places upon them. (Id.)
6. **NOTICE INVITING PROPOSALS—OMISSION TO RECITE ALTERNATIVE OF BOND—VALID CONTRACT.**—A contract awarded for the doing of street work under the Improvement Act of 1911 is not void, because of the fact that the notice inviting proposals omitted to recite that the alternative of a bond for an amount not less than ten per cent of the aggregate of the proposal should accompany such proposal, where the resolution of intention provided that either a certified check in such amount, or a bond for such amount, should accompany the proposal. (Id.)

**STREETS, ROADS, AND HIGHWAYS.** See *Municipal Corporations*, 8, 9; *Street Assessment*.

**SUMMONS.**

**ACTION FOR DIVORCE—SERVICE OF SUMMONS BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT.**—An affidavit for publication of summons in a suit for divorce which plainly and directly states that the defendant never has been a resident of the state of California, that she has never resided within the state, and that her home and residence is in Lynn, Massachusetts, the particular street number being given, is sufficient, *prima facie*, to support a valid order of publi-

**SUMMONS (Continued).**

ation, under section 412 of the Code of Civil Procedure, notwithstanding it does not follow a rule of the superior court requiring the affiant to give the information upon which the statement of residence is made, and if the information is contained in a letter, such letter must be attached to the affidavit. (*Porter v. Superior Court*, 608.)

See Justice's Court, 4.

**SUPERIOR COURT.** See Criminal Law, 22, 24; Election.

**SURETY.** See Appeal, 1.

**TAXATION.**

1. **CHURCH PROPERTY—CONSTRUCTION OF CONTRACT OF SALE.**—Where a contract for the sale of real property belonging to a religious corporation, and used exclusively for religious purposes, provides that the church is to retain the possession of the property for a designated period upon the payment of a stipulated rate of interest upon the paid-up installments of the purchase price in lieu of rent, the beneficial ownership of the property is in the vendee pending the payment of the remainder of the purchase price, and the church's use and occupation is in effect that of a tenant, and consequently the property is not exempt from taxation under the provisions of section 1½ of article XIII of the constitution. (*Havens v. County of Alameda*, 206.)
2. **TAXES ILLEGALLY COLLECTED—DEMAND FOR PAYMENT—MANDAMUS—PLEADING—SUFFICIENCY OF COMPLAINT.**—In a suit for a writ of *mandamus* to compel the supervisors of the city and county of San Francisco to approve and allow a claim for the payment of a judgment for the recovery of taxes illegally collected by the city and county, where the complaint set forth with great circumstantiality the history and nature of the claim, and after doing so averred plaintiff "presented his claim and demand to said board," the statement sufficiently shows that it was the detailed claim and demand of plaintiff which was brought before the board for its approval, and the complaint was sufficient as against either a general demurrer or a special demurrer for uncertainty. (*Burr v. Board of Supervisors*, 755.)
3. **CLAIM NOT PAYABLE OUT OF PARTICULAR FUND—APPROVAL BY BOARD.**—The claim for payment of a judgment for the recovery of certain taxes illegally collected by the city and county of San Francisco is one which is not required to be payable out of the revenues of any particular year or fund, but is a claim that the board of supervisors is bound to audit and approve, and the city is required to pay, irrespective of the provisions of the charter relative to the

**TAXATION (Continued).**

incurring of indebtedness or payment of claims in excess of the revenues of the city for any particular year. (Id.)

4. **PRESENTATION OF CLAIMS TO SUPERVISORS—USUAL PRACTICE—MANDAMUS.**—Where the usual procedure in the city and county of San Francisco with reference to the allowance and payment of claims is that they shall first be presented to the board of supervisors for its approval, which procedure plaintiff pursued on a claim for payment of a judgment for the recovery of taxes illegally collected by said city and county, plaintiff is entitled to a writ of mandamus requiring the board to follow the usual custom in this respect. (Id.)

See Inheritance Tax; Irrigation District.

**TENANT IN COMMON.** See Husband and Wife, 2.

**TENDER.** See Lodging-house, 2.

**TRESPASS.** See Fences.

**TRIAL.** See Eminent Domain; New Trial.

**TRUST.**

**CONVEYANCE OF REAL PROPERTY—SALE AND PAYMENT OF DEBTS OF GRANTOR—PROFITS DURING CONTINUANCE OF TRUST—FINDINGS—JURISDICTION TO ORDER SUBSEQUENT ACCOUNTING.**—In an action to have it declared that certain real property which included a running hotel and saloon business was conveyed to the wife of a debtor of the grantor upon the understanding of the debtor and grantor that the former was to sell the property, apply the proceeds in payment of such indebtedness together with certain other debts of the grantor, and pay to the grantor the residue, the finding that the debtor did not agree to pay to the grantor a fair or any proportion of the rents, issues, and profits of the property during the continuance of the trust, is not an express or explicit finding that no liability to account arose from the trust, and the court has jurisdiction to thereafter order an accounting to be made. (*Schneider v. Moncur*, 734.)

See Public Lands.

**VENDOR AND VENDEE.**

1. **RECOVERY OF MONEY PAID—WANT OF PERFORMANCE BY PLAINTIFF.**—The vendee under an option contract for the purchase of real estate, which provided that if the purchaser failed to make any of the payments as specified in the contract, the option should thereupon cease and determine, and the vendor should retain all sums paid

30 Cal. App.—56

**VENDOR AND VENDEE (Continued).**

"as the consideration and in full compensation for the option," is not entitled, upon default, to recover the money paid, but the vendor is entitled to retain the same. (*Bradford v. Sunset Land and Water Co.*, 87.)

2. **WANT OF ASSENT OF STOCKHOLDERS OF CORPORATION VENDOR TO SALE—DEFAULT OF VENDEE—POINT NOT AVAILABLE.**—In an action to recover the money paid under such an option contract which the vendee contended covered the entire business, franchise, and property of the corporation vendor, as a whole, the vendee is in no position to complain that the assent of the stockholders had not been obtained as required by section 361a of the Civil Code, where he had not paid, or tendered or offered to pay the balance due under the contract. (Id.)
3. **CORPORATION LAW—ASSENT TO SALE OF PROPERTY—CONSTRUCTION OF CODE—OPTION CONTRACTS NOT INCLUDED.**—The provisions of section 361a of the Civil Code that "no sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock," etc., makes no reference to option contracts to purchase real estate. (Id.)
4. **CONTRACT FOR SALE OF SEVERAL PARCELS—FAILURE OF TITLE TO SINGLE PARCEL—NONFORFEITURE OF CONTRACT.**—Under a written contract for the sale and purchase of several tracts of land comprising over one thousand acres which had been segregated into separate parcels, so described in the contract, and an acreage price placed thereon, the vendee cannot decline to purchase a specific parcel on the ground that the title to another parcel had failed, where the contract expressly provides that should the title to any of the described lands fail, it shall not work a forfeiture of the contract, but a deed to any such lands, together with the price, shall be placed in escrow until the title is perfected, provided the same is perfected within twelve months. (*Sage Land and Improvement Co. v. McCowen*, 126.)
5. **DEFECTS IN TITLE TO SPECIFIC PARCEL—ESCROW AGREEMENT—EFFECT OF.**—Under the terms of such a contract the vendee cannot complain of alleged defects in the title to a specific parcel, where a suit to quiet title was brought as to such parcel, the title quieted thereto, and a deed thereof placed in escrow, upon the sole and only condition that it and the price therefor should there remain for the period of one year to provide against the possible contingency of the defendants in such suit, who were served by publication, appearing and opening up their default. (Id.)

**VENDOR AND VENDEE (Continued).**

6. **DEFECTS IN TITLE—WAIVER.**—Where under a contract of sale it is the duty of a purchaser to point out defects in title, his failure so to do is a waiver of the defects. (Id.)
7. **CONTRACT OF PURCHASE OF LAND—EXERCISE OF OPTION—TENDER—INTEREST—SUFFICIENCY OF EVIDENCE.**—It is held in this action that the evidence was sufficient to sustain the findings of the trial court with respect to the exercise of an option to purchase land, and also that the interest should be computed up to the time of the tender only. (McPherson v. Eberhard Tanning Co., 289.)
8. **INSTALLMENT PAYMENTS—SECURITY OF PAYMENTS BY CROP MORTGAGE—APPLICATION OF PROCEEDS.**—Where a contract to purchase land provides that the price shall be paid in specific amounts at specified times, the vendor is not warranted under the terms of a crop mortgage given by the vendee to secure the payments of such amounts, in applying the proceeds of the whole crop on such price, where it is shown that both instruments were made at the same time, but is limited in making such application by the terms of the contract. (Morrow v. Wells, 306.)
9. **DEFAULT OF VENDEE—WHEN ENTITLED TO RETURN OF MONEY PAID.** A vendor after a breach of a contract of sale by the vendee, may agree to a mutual abandonment and rescission of the contract, and in such a case, the vendee is entitled to a repayment of the moneys paid. (Hay v. Casey, 570.)
10. **AGREEMENT CANCELING CONTRACT—REPAYMENT OF VENDEE—SUFFICIENCY OF EVIDENCE.**—An agreement made between a defaulting vendee and the vendor canceling the contract of sale, and giving a third party a thirty-day option to sell the property, and providing that the vendee shall be repaid out of the money fixed as the sale price, the amounts paid by him under the contract, and that in the event that the sum be not paid the vendee shall receive nothing and shall have no further claim in the property, is not a waiver of the rights of the vendee, in the event of a failure of the third party to make the sale, as there is no consideration for the waiver, and where the vendor afterward makes a sale of the property, and orally promises to repay the vendee when the sale is made, the vendee is entitled to recover. (Id.)

See Broker, 3-8; Specific Performance; Taxation.

**VENUE.** See Place of Trial.

**WARRANTY.** See Sale, 9-12.

**WATER AND WATER RIGHTS.** See Easement, 2.

**WAY.** See Right of Way.



**WORKMEN'S COMPENSATION ACT.**

1. **CONSTRUCTION OF — CASUAL EMPLOYEE.**—The Workmen's Compensation, Insurance, and Safety Act does not include a person whose employment is casual and not in the usual course of the trade, business, profession, or occupation of his employer; and one employed to apply two coats of paint to the house of his employer, the employer to furnish the painting materials and the employee to receive a certain amount *per diem*, the employment not being for any definite period of time, but the work being such as would reasonably be done within two weeks, is not entitled to recover for accidental injuries sustained the first day of his employment, resulting in temporary total disability, and the Industrial Accident Commission has no jurisdiction to award compensation for such injuries. (*Bloed v. Industrial Accident Commission*, 274.)
2. **DEFINITION OF "CASUAL."**—The ordinary signification of the word "casual" is something which comes without regularity, and is occasional and incidental, as distinguished from "regular," "systematic," "periodic," and "certain." (*Id.*)

**WRIT OF REVIEW.** See *Certiorari*.







